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Consenting Under Stress

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This Article highlights a disturbing gap between what is currently known about stress across a range of disciplines and the way stress is treated at law. It does so by focusing on parties who seek relief from contractual obligations on the grounds that they consented under stress. The Article first exposes the leading legal view that stress is merely a subjective feeling and therefore merits no legal recognition. It then provides a pragmatic synthesis of the rich study of stress in order to counter that misguided legal presumption and to offer a better understanding of the physical, social, and psychological dimensions of stress.

Exploring both the scientifically accepted causes of stress (stressors) and the known outcomes that result from stress, this Article offers a new framing of stress and a set of analytic tools that allow better legal access to the problem. This Article argues that legal actors can and should use the non-legal scientific understanding of stress to evaluate the arguments of those who claim to have consented to an unwanted contract while under stress. This Article concludes that informed evaluation of stress arguments is not only pragmatically necessary, but also conceptually required for any legal system that, like contract law, relies on the power of choice and consent.

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INTRODUCTION: THE PROBLEM OF CONSENTING UNDER STRESS

Have you ever experienced severe stress: stress that made it difficult to think straight and even more difficult to sleep? Stress that made you feel overwhelmed and perhaps depressed? If so, you understand the problem raised by this Article. Many of us have felt the impact of this kind of stress, especially in the wake of the recent economic crisis.[1] But even if you have not yet experienced severe stress, you probably know what scientists have been arguing for years: Stress kills. Stress causes severe disease, depression, loss of memory, and rapid aging of the brain. It also impairs processes of decisionmaking.[2] In many disciplines outside the law, researchers are focusing intensely on stress and its impact. They are investigating stress to better understand this human problem and also to identify interventions that could help mitigate it. In legal thought, however, the problem of stress is rarely noticed and even more rarely understood.

One important legal context which demands awareness of stress and its impact is the broad sphere of contracts. Parties operating under stress often consent to detrimental, sometimes disastrous, agreements; they then ask courts to relieve them from the legal consequences, citing their distraught condition at the time of assent. To support their claims, they argue that a distressed state of mind produced a defective, even meaningless, "decision" to agree. Significantly, their argument invokes compulsion: a claim that stress left them no choice but to consent to an agreement that under normal conditions would have been unacceptable. This Article refers to this claim as "the stress argument."

Although contract law does not inherently prevent courts from attending to the problem of contractual consent produced by stress, most courts fail to do so. Many courts tend to dismiss the stress argument because they fail to understand how significantly stress can distort the decisionmaking process. Because those who consented to a contract under stress often argue that they had no choice but to agree, the stress argument is frequently discussed by litigants and courts under the doctrine of duress. However, while duress is certainly the leading defense discussed by courts, this framework is hardly exclusive. The stress argument is often analyzed

1. AM. PSYCHOLOGICAL ASS'N, STRESS IN AMERICA 5 (2010) ("As the U.S. economy continues to struggle for the third year, findings from the 2010 Stress in America survey paint a picture of an overstressed nation.").

2. For fuller description, see the discussion of outcomes of stress, *infra* Part II.

under doctrines such as unconscionability or undue influence. Regardless of the doctrinal classification, the question is straightforward: Are there cases in which stress justifies legal relief?

This Article answers this question affirmatively. It seeks to expose a critical lack of legal understanding of the phenomenon of stress and to make the normative argument that stress must be taken into account. To do so, the Article focuses on three contexts in which the stress argument is repeatedly used: (1) commercial loan agreements based on financial need, (2) prenuptial agreements and separation settlements, and (3) resignation agreements that release employers from liability. The argument that follows does not advocate automatic relief in every case in which a party has consented under stress. Humans suffer from many forms of stress, which differ in their intensity and in their potential to impair choice. Correctly understood, this Article calls for more legal awareness of the problem of stress and its potential to undermine contractual consent.

Part I analyzes the legal disregard of stress in the contractual arena. It reveals a troubling theme: Courts tend to favor a narrow interpretation of the duress doctrine that fails to account for distressed voices. Within this narrow framework, courts too often dismiss stress arguments after classifying stress—without any reasoning or support—as nothing but a *subjective feeling*. As this Part demonstrates, this emotional taxonomy plays a major role in denying the stress a legal response. However, this Part also exposes a less prevalent judicial approach that responds to the problem of stress and is willing to offer relief to distressed parties. That such a "stress-sensitive" approach exists is promising, yet these cases offer no analysis to counter the prevailing approach that disregards stress. The result is a confusing and inconsistent treatment of the problem of consent produced under severe stress. What is missing is an account of the problem of stress and how and to what extent it impairs consent.

In response to this need, Part II turns to non-legal disciplines. It synthesizes data regarding stress gathered from biology, sociology, neurosciences, and psychology. In all these fields, scholars have engaged in a sustained inquiry into what turns out to be one of the greatest threats to human health and wellness. The knowledge that has been accumulated—which illuminates the meaning, sources, symptoms, and outcomes of stress—has much to offer to legal actors. This synthesis also suggests how those informative tools might be used to evaluate stress arguments in contracts cases. In short, this Part aims to highlight the magnitude of the problem, to counter the conventional legal argument that reduces stress to a subjective feeling, and to share possible standards that might be applied to the legal analysis of stress.

Part III integrates the knowledge explored in Part II into the legal analysis of distressed consent. As a starting point, it suggests a new perspective that focuses more on the stressed party and the quality of her

consent and less on the behavior of the non-stressed party. This Part argues further that the doctrinal demand that a distressed party demonstrate lack of reasonable alternatives to consent must be revised to reflect the impact of stress on a decisionmaker's ability to recognize and assess available alternatives. Finally, this Part proposes a four-element framework for articulating and evaluating stress arguments, offering courts and litigants the analytic tools to address the problem of consent under stress in a disciplined fashion.

In conclusion, the Article does not advocate releasing all parties under stress from the consequences of their consent. Such a move would be too damaging to people's trust in a much-needed system of contract. It does suggest, however, that courts recognize the meaning of stress, give careful attention to stress arguments, and award relief if the ability to consent was substantially distorted by *severe and proven* stress. Without this change, the predominant judicial approach will continue to permit and even reward exploitation of distress.

This Article offers two contributions—one practical and one theoretical. For practitioners, it explicates the current legal treatment of the problem of consenting under stress and proposes new ways to articulate stress arguments so they are less likely to be dismissed without consideration. For judges, it proposes novel tools to assess the credibility and weight of such stress arguments. For theorists interested in contract law and in legal issues of consent more generally, the Article offers a fresh set of lenses through which the ideas of consent and fault—as well as the intersection of these ideas—can be reexamined.

I. The Inconsistent Analysis of Stress Arguments

A. The Dominant Approach: No Relief

Most courts do not view stress that leads a person to accept an injurious contract as a sufficient reason for relief from that contract. Parties arguing that their consent resulted from stress rather than free choice face two obstacles that arise from the duress doctrine. The leading obstacle is the doctrine's fault requirement, which conditions relief on the wrongful behavior of the other party. This requirement results in a rejection of all arguments based on extrinsic stress that was not caused by the other party. The other obstacle is that relief is awarded only if the complaining party had no reasonable alternative to assent to the contract. Courts often point to alternatives that are unlikely to be available to the distressed parties, and they disregard the limitations that arise from their condition.

1. The Fault Requirement

Time and time again, courts have emphasized that to successfully use the defense of duress, the party seeking invalidation of a contract must convince the court that her dire straits were caused by the other party. Consequently, most courts focus not on the stressed party but rather on the other party. They insist that culpability, fault, wrongfulness, and coercion, in high doses, are necessary for the invalidation of a contract. Such a fault-based approach leads to a systematic refusal to help those severely disrupted and worn down by stress. Pressure and desperation not produced by the other party's wrongful behavior have been dismissed as irrelevant and as inadequate to meet the legal tests of duress. This approach prevails even if the party demanding enforcement knew about the vulnerability of the distressed party and benefited from it.

To grasp how the fault requirement leads to the dismissal of stress-based arguments, consider a recent Sixth Circuit decision.[3] Mary Ann Gascho worked for more than thirty years as a nurse at a hospital until she lost her job.[4] At the time she lost her job, she signed a separation agreement in which she waived all her claims against her employer.[5] She later sued the hospital claiming sexual harassment under Title VII; she argued that despite the release, her allegations should be entertained because her consent was a product of duress.[6] For many years, Mary Ann was married to the president and CEO of the hospital, Dwight Gascho, with whom she had three children.[7] After many years of marriage, Mary Ann became aware that her husband was having an affair with the vice president of the hospital.[8] During that time, her husband abused her; one night, he raped her, leaving her with a split lip.[9] Later, when Mary Ann confronted her husband's mistress at the hospital, things became publically violent. Mr. Gascho, who admitted his infidelity, "grabbed her around the shoulders and dragged her into his office, causing bruises on her back and scratches on her back, arms and wrists."[10] Next, in his capacity as the hospital's CEO, he fired her.[11] At that point, the hospital's Human Resources Director converted the discharge to a three-day suspension followed by a "mental health leave."[12] While on leave, the hospital's officials visited Mary Ann and presented her with the separation

3. Gascho v. Scheurer Hosp., 400 F. App'x 978, 979–84 (6th Cir. 2010).

4. *Id.* at 981.

5. *Id.* at 980.

6. *Id.* at 981.

7. Gascho v. Scheurer Hosp., No. 08-10955-BC, 2009 WL 2222872, at *3 (E.D. Mich. July 23, 2009).

8. *Id*. at *1.

9. *Gascho*, 400 F. App'x at 979–80. In another event reported in the case, he kicked her in bed, blaming her for "snoring like a cow." *Id.* at 979.

10. *Id*. at 980.

11. *Id*.

12. *Id*.

agreement, which she eventually signed. The fact that she was shaken, intimidated, and depressed by the entire crisis and its life-changing consequences was known to the hospital's officials.[13] However, despite offering a detailed description of Mary Ann's distress, the court refused to award her relief.

The appellate court explained that its refusal to award relief, notwithstanding the extreme conditions, was due to the hospital's lack of fault. Mary Ann's distress had another cause: It was mainly the fault of her husband.[14] Accordingly, Mary Ann's condition, regardless of its severity, was insufficient to undermine the validity of her consent. Her witnessed physical injuries,[15] her abuse by her husband,[16] her undisputed "great deal of stress,"[17] her recognized "mental anguish at her husband's betray[al],"[18] her documented fear of her husband's ongoing threats,[19] her noticeable loss of weight,[20] her financial and professional anxiety,[21] her ongoing crying,[22] and the acknowledged fact that at the time of signing she was seeing a therapist and taking both antidepressants and prescribed sleeping aids[23]—all these facts taken together were not enough to justify relief. Even a professional diagnosis, made only one day after the contract's execution that confirmed Mary Ann's "major depression" and "limited coping skills,"[24] did not help. The fault requirement worked to block the stress argument even when no one doubted the stress or its severity.

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13. According to the district court (but not mentioned by the appellate court), one of them "testified that he knew that [Mary Ann] was under a great deal of stress at the time." *Gascho*, 2009 WL 2222872, at *2. He also testified that she "was nervous and distraught and that [she] was crying," adding that she "had bruises, which he was aware that she had received from Gascho." *Id.* Another official "was also aware of [Mary Ann's] injuries, that she was on medication, that she had lost a significant amount of weight, and that she was afraid of Gascho, who lived in an adjacent apartment." *Id*.

14. Note that in deciding so the court peculiarly ignored the evident connection between the hospital and its chief executive, Mary Ann's boss and husband. *See Gascho*, 400 F. App'x at 984 ("The hospital played no role in the husband's physical misconduct, and of course had no reason to know about the incidents at home.").

15. *Gascho*, 2009 WL 2222872, at *2.

16. *Gascho*, 400 F. App'x at 984.

17. *Gascho*, 2009 WL 2222872, at *2.

18. *Gascho*, 400 F. App'x at 980 (alteration in original) (internal quotation marks omitted).

19. According to the district court's decision, Mary Ann's husband threatened her many times throughout the period preceding the agreement. He threatened, for example, that she "could not walk through the hospital without an escort" and that he would "destroy her life." *Gascho*, 2009 WL 2222872, at *2–3. The record also mentions that Mary Ann was "intimidated by Gascho and fearful of him." *Id*. at *3.

20. *Id.* at *2.

21. *Gascho*, 400 F. App'x at 980.

22. *Gascho*, 2009 WL 2222872, at *2.

23. *Gascho*, 400 F. App'x at 980.

24. *Gascho*, 2009 WL 2222872, at *3.

A leading case for the proposition that the duress defense necessitates fault is Judge Posner's *Selmer Co. v. Blakeslee-Midwest Co.*[25] In that case, a contractor refused to fully compensate a subcontractor; instead, he offered to settle with the subcontractor for less than the agreed-upon amount.[26] The subcontractor accepted and later sued for the difference, arguing that his consent emerged from a desperate financial condition that made him especially vulnerable to the contractors' pressure.[27] In what has since become the most familiar phrasing of the duress doctrine, Judge Posner emphasized that the fault of the defendant is required: "The mere stress of business conditions will not constitute duress where the defendant was not *responsible for* the conditions."[28]

But why isn't the stress enough? In *Selmer*, as in *Gascho*, the court acknowledged that such stress existed and influenced the assent of the party seeking relief. Judge Posner recognized the dire financial state of the subcontractor,[29] but explained that it did not matter because the other party, the contractor, could not "be held responsible for whatever it was that made [the subcontractor] so necessitous."[30] What makes *Selmer* so significant is not simply that it established a fault requirement; *Selmer* also explained why the stress of one party does not alone justify relief. Rationalizing the logic of the duress defense, Judge Posner wrote:

> [T]he promise is unenforceable. . . . not, as so often stated, because such a promise is involuntary. . . . The fundamental issue in a duress case is therefore *not the victim's state of mind* but whether the statement that induced the promise is the kind of offer to deal that we want to discourage, and hence that we call a "threat."[31]

In other words, to Judge Posner,[32] and to the many courts that follow his approach, the state of mind of the person under stress is never enough in and of itself. A contract might be involuntary and still be enforced—exactly as shown by *Gascho* and many other cases.[33] This part of the

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25. 704 F.2d 924 (7th Cir. 1983).

26. *Id.* at 926.

27. *Id.*

28. *Id.* at 928 (emphasis added) (quoting Johnson, Drake & Piper, Inc. v. United States, 531 F.2d 1037, 1042 (Ct. Cl. 1976)); *see* Fed. Deposit Ins. Corp. v. Linn, 671 F. Supp. 547, 560 (N.D. Ill. 1987) ("Defendants cannot blame [plaintiffs] for the pressures caused by defendants' own business decisions and by general economic conditions.").

29. *Selmer*, 704 F.2d at 926 ("When the job was completed, Selmer demanded payment of $120,000. Blakeslee-Midwest offered $67,000 and refused to budge from this offer. Selmer, because it was in desperate financial straits, accepted the offer."). It is not clear from the case what made the subcontractor so desperate. *Id*. at 929.

30. *Id*.

31. *Id.* at 926–27 (emphasis added) (citation omitted).

32. Interestingly, Judge Posner has been described as a judge that "has never written an opinion in which he found duress available to a litigant." *See* Douglas G. Baird, *The Young Astronomers*, 74 U. CHI. L. REV. 1641, 1651 (2007).

33. *See, e.g.*, Lannan v. Reno, No. 97-3170, 1998 U.S. App. LEXIS 3292, at *4–5 (7th Cir. Feb. 26, 1998) ("While Lannan may have felt that the financial, personal, and medical stress in her life

Selmer decision stands in the way of recognizing the problem of consent impaired by stress.

Further, not only is fault required in this narrow definition of duress, but a higher degree of fault is now required. In *Gascho*, recall the argument that the hospital was not responsible for Mary Ann's condition. Now consider the fact that the hospital, as an employer of both Mary Ann and her husband, had let its CEO and president drag an employee along the hall, causing her visible bruises and much humiliation, without taking any measures against its harassing senior executive. Even accepting the problematic argument that the hospital is not responsible for the "personal" behavior of its own president and CEO, isn't it clear that the hospital was at least partially responsible for the turmoil that eventually led Mary Ann to resign and sign a release form?

The *Gascho* decision suggests that a stress argument may fail not only where stress is caused solely by extrinsic circumstances but also in "mixed" cases, where the stress results from a combination of some faulty behavior of the unstressed party and other extrinsic events. Indeed, as other cases further clarify, in some courts stress cannot be grounds for relief unless the other party was the *dominant* cause of it.[34] Consequently, the problem of stress is marginalized: Even severe stress of one party combined with *some* fault of the other is not sufficient.

2. *The Reasonable Alternative Barrier*

The distraught condition of the party consenting under stress is further marginalized by an insensitive application of the reasonable

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necessitated the acceptance of the defendant's offer of settlement, there is no evidence that the defendant exploited her, oppressed her, took undue advantage of her financial or personal problems, or otherwise wrongfully pressured her into signing the settlement agreement."); DCR Fund I, LLC v. TS Family Ltd. P'ship, No. 05-6232, 2008 U.S. App. LEXIS 1574, at *9–12 (10th Cir. Jan. 24, 2008) (noting that stress coming from the wife's illness and financial pressure was not enough because it was not caused by any actions of the other party).

34. *See, e.g.*, Bank of Am. v. First Mut. Bancorp of Ill., Inc., No. 09 C 5108, 2010 U.S. Dist. LEXIS 65557, at *32–33 (N.D. Ill. July 1, 2010). Like in *Gascho*, the party seeking relief in this case was arguing that its consent to demanding loan terms was a product of severe pressure and desperate circumstances. Again, the fault requirement led to a rejection of the request for relief. *Id.* at *33–34. Yet, unlike in *Gascho*, the court did not ignore the possible contribution of the party seeking enforcement (Bank of America) to the poor condition of the party seeking relief (the borrowers). To the contrary, the court explicitly acknowledged at least *some* degree of misbehavior on the part of the bank, which kept lending the borrowers money, dangerously increasing their indebtedness, without disclosing to the borrowers the crucial fact, known to the bank, that their business partners were defrauding them in a manner that would eventually ruin them financially. *Id.* at *5–20. However, the recognized misbehavior of the bank was determined to be insufficient to justify relief. Engaging in an evaluation of the level of fault on the part of the bank and weighing it against the fault of others, the court seems to conclude that, since the bank's fault was not the only or at least the dominant reason for the borrowers' demise, their argument fails. The court relied on the *Selmer* case to make this point, citing the latter case as "rejecting economic duress defense where one party may have contributed to, but did not proximately cause, the other's financial vulnerability." *Id.* at *33.

alternative test. According to this test, a contract cannot be invalidated if the party seeking relief had a reasonable alternative other than agreeing to the contract in dispute. The logic of the test is that when a reasonable alternative exists, the decision to consent represents a meaningful choice and therefore should be enforced. However, when distressed parties argue that their stress had left them no choice, many courts respond unsympathetically. They tend to point out that while the stress may have caused a feeling of compulsion, in reality other alternatives were available and therefore there is no justification for relief. For example, consider how the court applied the reasonable alternative test in *Gascho*. There, Mary Ann argued that given her exhaustion, intimidation, financial anxiety, and depression, she had no choice but to consent to the hospital's settlement offer. In response, the court dismissed her state of mind—even though evidence other than her testimony supported her high level of stress—and reclassified her "no-choice" as merely her "belief." The court subsequently rejected that "belief" by contrasting it with what seemed to the court to be viable alternatives.[35]

Labeling the stress-based argument a "belief" or a "feeling" immediately removes it from the realm of objectivity, a requirement under the reasonable alternative test. The gap between stress arguments and the objective standard is further emphasized by the many decisions that describe stress not simply as a feeling, but also as a "subjective" feeling.[36] Moreover, in some cases, the incompatibility is further highlighted by adopting the rhetoric of "subjective feeling" and then juxtaposing it to a description of the test that uses the term "objective." For example, in *Satter v. Washington State Department of Ecology* the court maintained: "When Satter states that she suffered anxiety, depression, and an

35. Gascho v. Scheurer Hosp., 400 F. App'x 978, 983 (6th Cir. 2010) ("Gascho's *belief* 'that [she] had no choice' in signing the agreement, in view of the economic benefits offered and the risk of economic hardship if she declined the offer, does not by itself state a claim . . . ." (alteration in original) (emphasis added)); *see* Cobb v. Potter, No. 1:05CV300, 2006 U.S. Dist. LEXIS 63118, at *20–21 (W.D.N.C. Aug. 22, 2006) ("Plaintiff contends that she was under duress and felt as if she had no choice but to sign the waiver . . . . [but] [p]laintiff was free to not sign the Pre-Arbitration Settlement Agreement . . . .").

36. *See, e.g.*, Porter v. Chi. Bd. of Educ., 981 F. Supp. 1129, 1132 (N.D. Ill. 1997) ("Plaintiff's generalized expression of *subjective feeling* is fatally conclusory and wholly unsupported by specific factual averments to support a claim of duress." (emphasis added)). Reducing the argument to a "subjective feeling" is far from being an incidental choice of words. Rather, as a recent study shows, it is the characteristic method in which courts refuse to find duress in the reality of settlements achieved under judicial supervision. *See* Nancy A. Welsh, *The Thinning Vision of Self-Determination in Court-Connected Mediation: The Inevitable Price of Institutionalism?*, 6 HARV. NEGOT. L. REV. 1, 76 (2011); *see also* Fed. Deposit Ins. Co. v. Ramsey, 612 F. Supp. 326, 328–29 (E.D. Tenn. 1985) ("Defendant's *subjective belief* that he was under pressure to purchase the stock . . . is insufficient to show [economic duress] . . . ." (emphasis added)); Yok Hing Law v. Corral, No. A120738, 2010 WL 528478, at *10 n.2 (Cal. Ct. App. Feb. 16, 2010) ("Plaintiff . . . does not cite to any authority for the proposition that a *subjective feeling* of intimidation is sufficient to void an otherwise valid settlement agreement." (emphasis added)).

inability to sleep or be alone, she is speaking about things she *subjectively* felt and experienced."[37] The court then added that the legal "objective standard *does not take into account* the things Satter was *subjectively feeling or experiencing emotionally*."[38]

The conflict between the stress argument and the chosen standard is also reflected by the types of alternatives that courts consider as "reasonable." Courts frequently point to options that require substantial agency and energy, significant amounts of money, well-developed resilience skills, and—perhaps most important—a strong drive to fight rather than to assent. The leading alternative that courts mention in this context is resisting the pressure to consent through litigation. Revealingly, they refer to the litigation alternative in dozens of cases as the need to boldly "stand pat and fight."[39] However, such an expectation ignores the limited capabilities of distressed people at the time of consenting. For parties overborne by stress, initiating, funding, and managing prolonged legal battles, often against people who were deeply involved in creating their condition, seems like an impossible mission.[40]

Applying the objective/subjective dichotomy to this context while marking the duress test as "objective" and the stress argument as "subjective" is, therefore, far from a neutral stance.[41] It is also important to note the cumulative character of these doctrinal obstacles: Since many courts consider duress as requiring both fault of one party and no reasonable alternative by the other—and since those courts also narrowly construe those elements—these elements often work in concert to deny any relief for those consenting under stress.

B. Some Stress-Sensitive Cases

Despite the frequent disregard of stress, some courts do take stress arguments into account and award relief to distressed parties. In those occasional cases a fundamental, albeit somewhat old, tenet of contract law is coming back to take center stage: meaningful consent. This tenet

37. Satter v. Wash. State Dep't of Ecology, No. C09-5645BHS, 2010 U.S. Dist. LEXIS 80520, at *16 (W.D. Wash. Aug. 10, 2010) (emphasis added).

38. *Id*. at *17 (emphasis added).

39. *See, e.g.*, Molsness v. City of Walla Walla, 928 P.2d 1108, 1110 (Wash. Ct. App. 1996) ("Mr. Molsness' resignation is not rendered involuntary simply because he submitted it to avoid termination for cause, nor is it relevant that he subjectively believed he had no choice but to resign. Objectively, he did have a choice . . . *to 'stand pat and fight'*." (emphasis added)). A textual search for the phrase "stand pat and fight" has yielded at least fifty-two cases in which the phrase was used to describe a reasonable alternative.

40. *See Gascho*, 400 F. App'x at 984 (suggesting that Mary Ann Gascho, in her proved difficult condition, had several reasonable alternatives, all based on taking legal actions against her husband, including filing criminal charges against him, suing him in tort, or obtaining a restraining order against him).

41. Those arguments will be further developed in Part III.

obscures the majority's focus on fault and reasonable alternatives. While judges are naming that traditional concern differently—from will to choice to voluntariness—they are all showing some level of care about the impaired state of mind created by stress.

1. Taking Stress into Account

From time to time judges refuse to ignore circumstances that are evidently stressful. One example of judicial sensitivity to stress as impairing contractual consent is *Holler v. Holler*.[42] That case follows a pattern in marital dissolution cases, in which brides-to-be were pressured by their future husbands to consent to unfair prenuptial agreements that deprived them of many of their marital rights. Generally, courts have dismissed duress arguments, made years later by the wives who had to face the results of their pressured, pre-wedding consent. They have refused to recognize the stress suffered by brides-to-be who faced the "choice" between signing an unfair prenuptial or a cancellation of their wedding. Even when the "choice" was presented to the bride just a few days before the wedding, courts repeatedly opined that cancelling the wedding was a reasonable alternative to consent.[43] In *Holler*, however, the court found the stressful condition of the bride both relevant and significant.

Natalia came to the United States to marry William Holler after the two of them met during his visit to the Ukraine.[44] She knew very little English and had no income of her own, which made her fully dependent on William's support.[45] Before they got married, Natalia became pregnant, and the visa enabling her legal stay in the States was about to expire.[46] Under these circumstances, she wanted and needed to marry William to stay in the county, but he required her to sign a prenuptial agreement written in English.[47] He emphasized that "she must sign the agreement if she wanted to be married prior to the expiration of her visa."[48] Despite her many efforts to translate the agreement into Russian or to read it in English, Natalia was neither able to completely understand the agreement,[49] nor could she afford to hire a lawyer who would explain it to

42. 612 S.E.2d 469 (S.C. Ct. App. 2005).

43. The majority of courts have rejected claims of duress in such situations even when the agreement was presented by the husband-to-be in the very last minute, even when he threatened to cancel the wedding, even if the wife was pregnant, and even if she was unemployed or an immigrant. *See, e.g.*, Biliouris v. Biliouris, 852 N.E.2d 687, 693 (Mass. App. Ct. 2006) (rejecting a stress argument of a bride who signed a prenuptial agreement two days before her wedding, due to fear of cancellation of the wedding, and while pregnant and crying).

44. *Holler*, 612 S.E.2d at 471.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 476.

49. *Id.* at 475 (finding that Natalia could not understand the agreement).

her and represent her interests.[50] Eventually, only eight days before the expiration of her visa, Natalia signed the agreement and married William five days later. When the couple separated years later, William argued that under the prenuptial agreement Natalia gave up her rights to equitable distribution of their marital property and for alimony. Natalia, on the other hand, asked for relief. Affirming a former decision of the family court, the court of appeal ruled for Natalia, taking into account the rare accumulation of circumstances that rendered her consent meaningless.[51]

In another case, which stands in direct opposition to the *Gascho* decision, a female employee named Melinda Meyers prevailed where Mary Ann Gascho failed.[52] Male senior coworkers had sexually harassed Meyers and, after she made efforts to resist and complain, her employer convinced her to resign and sign a release agreement.[53] At the time of consent, she was completely distraught: Meyers "was in a 'confused and upset' psychological state,"[54] "extremely frightened and intimidated,"[55] emotional and unable to "deal with anything,"[56] and "lost control and broke down."[57] The court rejected her employer's motion for summary judgment, explaining that after taking Meyers' "mental state" into account,[58] she could not be legally seen as "knowingly and voluntarily" agreeing to the release she signed.[59]

Cases such as *Holler* and *Meyers* differ greatly from the many cases that disregard the problem of stress. First, they seem to focus less on the unstressed party and more on the party who consented under pressure. Then, using varying terminologies, they tend to emphasize the principle that a valid contract cannot be based on professed consent not representing a meaningful choice. For the most part, the difference between these two judicial outlooks may be traced to two opposite views of duress. While the conventional approach underscores that duress is *not*

50. *Id.* at 476 ("Wife had no money of her own with which to retain and consult an attorney or a translator.").

51. The courts' reasoning will be discussed in the following Section. *See infra* Part I.B.2.

52. Meyers v. Trugreen, Inc., No. 03 C 7570, 2004 U.S. Dist. LEXIS 9200 (N.D. Ill. May 21, 2004).

53. The question of how much explicit pressure to resign was put on Melinda was left factually undecided by the court. According to Melinda's affidavit she was told that if she would not resign "she was going to be fired and would end up with no job and no money." *Id.* at *8.

54. *Id.* at *11.

55. *Id.* at *12.

56. *Id.*

57. *Id.*

58. *Id.* at *10.

59. *Id.* at *17. It is worth noting that in the employment context the contractual doctrines discussed here are often supplemented by more protective doctrines that make it somewhat easier for stress-sensitive courts to take stress into account. One doctrine that might be helpful for employees is the constructive discharge doctrine, which asks: "Did working conditions become so intolerable that a reasonable person in the employee's position would have felt compelled to resign?" Pa. State Police v. Suders, 542 U.S. 129, 130 (2004).

about the state of mind of the party seeking relief,[60] the stress-sensitive cases portray duress first and foremost as an issue of inappropriate state of mind. The *Holler* court, for example, emphasized that notion by adopting the following definition: Duress "is a *condition of mind* produced by improper external pressure or influence that practically destroys the *free agency* of a party and causes him to do an act or form a contract not of his own *volition*."[61]

Similarly, in *Meyers*, the court referred directly to stress and characterized duress as "the taking of undue advantage of the business or financial *stress* or extreme necessities or weaknesses of another."[62] Other stress-sensitive cases have highlighted the concern for the quality of consent of the stressed party using a variety of phrases. They concluded, for example, that stressful conditions may "wholly incapacitate a person from exercising his judgment,"[63] may render the consent "involuntary," and may result in no "meaningful choice."[64] Such courts have also concluded that more inquiry should be made into the existence of "meaningful 'consent.'"[65] These different expressions echo the repeated emphasis in *Holler* of the freedom of will as a leading tenet of both contract law and the doctrine of duress.[66]

2. *The Lack of Counter-Theory*

How do those stress-sensitive courts reconcile their approach with the fault requirement that prevents the accommodation of stress in the majority of cases? Some of them avoid the doctrine of duress altogether and utilize alternative legal doctrines to offer people consenting under severe stress relief. Specifically, those courts mainly use the proximate

60. Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 927 (7th Cir. 1983) ("The fundamental issue in a duress case is therefore not the victim's state of mind . . . .").

61. Holler v. Holler, 612 S.E.2d 469, 474 (S.C. Ct. App. 2005) (emphasis added). For an identical definition in a commercial setting, see *Willms Trucking Co. v. JW Construction Co.*, 442 S.E.2d 197, 202 (S.C. Ct. App. 1994).

62. Meyers v. Trugreen, Inc., No. 03 C 7570, 2004 U.S. Dist. LEXIS 9200, at *17 (N.D. Ill. May 21, 2004) (emphasis added) (citation omitted).

63. Odorizzi v. Bloomfield Sch. Dist., 54 Cal. Rptr. 533, 540 (Ct. App. 1966) ("It is possible that exhaustion and emotional turmoil may wholly incapacitate a person from exercising his judgment.").

64. *See In re* Davis, 169 B.R. 285, 290, 304 (Bankr. E.D.N.Y. 1994); *see also In re* Emery-Watson, 412 B.R. 670, 675 (Bankr. D. Del. 2009) ("The Court finds that the Debtor had *an absence of meaningful choices* with regard to saving the Property from foreclosure at the time they contracted with the Defendant for its 'sale.'" (emphasis added)).

65. Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 749 (D.C. Cir. 2000) (doubting the meaningfulness of consent of Mr. Williams who had only a sixth-grade education from the segregated schools of Savannah, Georgia, and who, in order to escape foreclosure, gave his consent to a refinancing agreement that left him with no means to get food and other necessities).

66. *Holler*, 612 S.E.2d at 475 ("The central question with respect to whether a contract was executed under duress is whether, considering all the surrounding circumstances, one party to the transaction was prevented from exercising his free will . . . . Freedom of will is essential to the validity of an agreement." (citation omitted)).

doctrines of undue influence[67] and unconscionability.[68] At other times they avoid duress by turning to other contractual doctrines[69] or, when available, to special statutes.[70] Other stress-sensitive courts, instead of avoiding duress, attempt to harmonize the conventional interpretation of the doctrine with their own sensitivity to stress. The result, however, may be more confusing than harmonious. In fact, in one case the court described the duress doctrine as containing both the idea that stress is not enough unless caused by the other party, and the *opposite* idea that great stress or extreme weakness might be enough, even without the causal element.[71] In a similar manner, the *Holler* court highlighted the significance of free will, together with the requirement of fault, as if they can naturally coexist.[72] Only that court's actual application of the doctrine reveals the stress-sensitive departure from the fault requirement.[73]

One court has gone so far as to use the duress doctrine without reference to any fault requirement. In *In re Accredited Home Lender Holding Co.*, the court used the duress doctrine to find for a stressed party without alluding to any fault requirement.[74] Similar to some of the cases

67. For an example of using undue influence to cope with a stress problem *instead of* using duress, see, for example, *Odorizzi*, 54 Cal. Rptr. at 539 ("Undue influence, in the sense we are concerned with here, is a shorthand legal phrase used to describe persuasion which tends to be coercive in nature, persuasion which overcomes the will without convincing the judgment. The hallmark of such persuasion is high pressure, a pressure which works on mental, moral, or emotional weakness to such an extent that it *approaches the boundaries of coercion*." (emphasis added) (citation omitted)). At other times, the doctrines of duress and undue influence have been used side by side. *See generally* Johnson v. Int'l Bus. Machs. Corp., 891 F. Supp. 522 (N.D. Cal. 1995) (discussing duress and undue influence arguments and rejecting them both).

68. For using unconscionability to cope with a stress problem, see, for example, *Williams*, 225 F.3d 738 at 748. Mr. Williams found himself agreeing to an impossible refinancing agreement in fear of losing his home in a foreclosure process. Since the other party (a mortgage company) did not cause Mr. Williams' financial problems, the conventional application of the duress doctrine probably could not have helped him. More generally, what makes unconscionability a possible home to distraught parties is its concern with the lack of "meaningful choice." *See Holler*, 612 S.E.2d at 476 ("Unconscionability is the absence of meaningful choice on the part of one party . . . .").

69. Other doctrines that have been used are good faith and public policy. *See, e.g.*, Williams v. B & K Med. Sys., Inc., 732 N.E.2d 300 (Mass. App. Ct. 2000) (good faith); Motley v. Motley, 120 S.E.2d 422 (N.C. 1961) (public policy).

70. *See, e.g.*, Blistein v. St. John's Coll., 860 F. Supp. 256 (D. Md. 1994) (discussing a job loss case regarding relief from waiver since the employer did not follow the requirements of the Older Worker's Benefit Protection Act).

71. *See* Reliford v. United Parcel Serv., No. 08 CV 1266, 2008 WL 4865987, at *5 (N.D. Ill. July 8, 2008) (stating, with direct reference to Posner's decision in *Selmer*, that "[w]ith respect to the party coerced into signing an agreement, difficult financial circumstances or a weak bargaining position are insufficient to establish duress, provided that the other party was not responsible for creating those conditions" and then adding, "[r]ather, to claim duress, a party must be under *great stress* or in a state of extreme necessity or weakness" (emphasis added) (citations omitted)).

72. *See, e.g.*, *Holler*, 612 S.E.2d at 474–75.

73. In *Holler* the court did take into account elements of the wife's condition that could not have been considered as caused by her husband, such as her limited proficiency in English and her fear of having to leave the United States due to the expiration of her visa. *Id.* at 471–76.

74. *In re* Accredited Home Lender Holding Co., 441 B.R. 443 (Bankr. D. Del. 2011).

already discussed,[75] the context was a loan agreement signed by a stressed borrower. In this case, the borrower gave his consent to a problematic agreement under the pressure of anticipated home foreclosure and later asked for relief.[76] In response, the lenders argued that the borrower could not use the duress defense because he failed to meet the two main tests of the doctrine: fault and reasonable alternative.[77] In terms of fault, the lenders maintained that according to the duress doctrine, circumstances that they did not cause could not be part of the coercion analysis.[78] In terms of reasonable alternatives, the lenders contended that the borrower had an alternative to consenting: "[H]e could have defended the foreclosure action."[79] This structure of argument would have certainly worked under the conventional interpretation of the duress doctrine. However, the court decided to award the borrower relief under the duress defense; it did so by focusing on the borrower's condition. The court noted that at the time of consenting, the borrower was facing a loss of his home, was not represented by a lawyer, and "was under the care of a physician for post traumatic stress syndrome."[80] Significantly, the court disregarded the lenders' no-fault arguments.[81]

Whatever the analytic framework chosen by the few stress-sensitive courts has been, no framework has never directly and explicitly recognized stress alone as a ground for relief. These stress-sensitive cases are so few in number and use such different methods in responding to the stress argument that general rules are difficult to synthesize and destined to be imprecise. However, in each of the stress-sensitive decisions, the court *intuited* two underlying principles, even if it did not emphasize them. First, stress can be a serious and demonstrable condition that might truly impair consent and, as such, deserves judicial attention: This differs starkly from classifying stress as merely a subjective feeling. Second, consenting under stress justifies relief because it stands in conflict with the contractual ideals of volition, free agency, and meaningful choice: This assumption counters the fault

75. *See generally* Bank of Am. v. First Mut. Bancorp of Ill., Inc., No. 09 C 5108, 2010 U.S. Dist. LEXIS 65557 (N.D. Ill. 2010); Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738 (D.C. Cir. 2000).

76. *Accredited Home Lender Holding Co.*, 441 B.R. at 444–45.

77. *Id*. at 447 ("The Debtors argue that the circumstances giving rise to the Forbearance Agreement were not coercive. They assert that they acted within their legal rights as set forth in the Mortgage by commencing the foreclosure action. They contend that Mr. Smalls had an alternative to signing the Forbearance Agreement: he could have defended the foreclosure action.").

78. *Id.* (citing McLaughlin v. State Dep't of Natural Res., 526 So. 2d 934, 936 (Fla. Dist. Ct. App. 1988) (holding that to prove duress a party must show "(1) that one side involuntarily accepted the terms of another, (2) that circumstances permitted no other alternative, and (3) that said circumstances *were the result of coercive acts of the opposite party*" (emphasis added))).

79. *Id.* at 447.

80. *Id.*

81. *Id.* at 447–48.

requirement. While the goal of this Part has been to analyze the legal confusion with regard to the problem of consenting under stress, the goal of the next two Parts is to argue the importance of those two intuitions.[82] Accordingly, the next Part focuses on the first intuition and on the actual meaning of stress, suggesting scientific foundation for the serious concern of stress-sensitive courts.[83]

II. UNDERSTANDING STRESS

A. THE STUDY OF STRESS

Stress is not merely a subjective feeling. The reason so many disciplines are interested in researching stress is the growing awareness of its bitter consequences to individuals and their health and well-being, to families and their cohesion, to communities and their strength, and to society at large.[84] Works in biomedicine, psychology, neuroscience, sociology, and education all point—through diverse methods and different theories—to one conclusion: While some stress can be valuable or at least tolerable, prolonged, high levels of stress produce a negative impact on human beings' lives. This damaging aspect of stress—to physical health, to mental condition, to cognitive functioning, and to a combination thereof—has been motivating the study of stress for several decades.[85] Beyond concluding that stress is damaging, however, the study of stress is sprawling and at least one stress scholar has gone as far as to call this

82. To clarify: Smoothing out the differences between these cases and resolving doctrinal incoherence are not among of the goals of this Article.

83. Part III will engage with the second intuition regarding the importance of quality of consent.

84. There are numerous statistics of the impact of stress in the United States. *See, e.g.*, HENRY L. THOMPSON, THE STRESS EFFECT: WHY SMART LEADERS MAKE DUMB DECISIONS—AND WHAT TO DO ABOUT IT 112 (2010) ("[I]n the United States, stress costs industry an estimated $300 billion a year. . . . It is also linked to the six leading causes of death in the United States: heart disease, cancer, lung ailments, accidents, cirrhosis of the liver, and suicide. . . . [M]ore than 200 million people take medication related to controlling stress.").

85. For a concise description of the development of the scientific study of stress, see David C. Glass, *Foreword*, *in* THE HANDBOOK OF STRESS SCIENCE: BIOLOGY, PSYCHOLOGY, AND HEALTH xvii (Richard J. Constrada & Andrew Baum eds., 2011). Many mention the seminal work of the Viennese endocrinologist Hans Selye and his 1956 book *The Stress of Life* as marking the beginning of the modern focus on the problem of stress as an identifiable subject. *See id*. at xvii; *see also* AM. INST. OF STRESS, GENERAL INFORMATION BROCHURE (2012) ("Stress has become such an ingrained part of our vocabulary and daily existence, that it is difficult to believe that our current use of the term originated only a little more than 50 years ago, when it was essentially 'coined' by Hans Selye."). By 1975 the issue was further acknowledged by the foundation of the *Journal of Human Stress*, and in 1978 the American Institute of Stress was formally established as an educational organization designed to serve as a clearing house for information on all stress-related topics. *Id.* Importantly, much of the empirical work and some of the theoretical work was implemented and funded by the U.S. Army with special emphasis—relevant to our focus—on decisionmaking under stress. *See, e.g.*, KENNETH R. HAMMOND, JUDGMENTS UNDER STRESS (2000).

body of work "internally incommensurable."[86] At the same time, efforts to establish an interdisciplinary discourse of stress are flourishing,[87] and scholars seem to share a belief in the inability to capture the phenomenon of stress under one leading discipline, as it is never merely psychological, purely physical, or solely sociological.

The following synthesis of the study of stress is a pragmatic response to these challenges, a "useful synthesis"[88] especially tailored for legal actors who wonder how legal analysis can take stress into account. As I have shown in Part I, the main resistance to arguments based on stress comes from the notion that stress is so personal and emotional that it cannot be assessed, proven, analyzed, and incorporated into a legal discourse. Therefore, my goal is to offer an analysis of stress that explains its patterns, enabling practitioners to structure stress arguments and assisting courts to evaluate them. In creating a general framework, I found it most helpful to draw on the Stress Process model, which was created in the 1980s by sociologist Leonard Pearlin, and which inspired numerous works on stress.[89] According to this model, exposure to stressors that exceed one's ability to cope with them creates the condition of stress, sometimes called distress or a stress response.[90] Despite working under this sociological structure, my analysis includes other findings about stress that come from disciplines that do not necessarily share a sociological outlook. For example, scientists interested in the impact of stress on the cardiovascular system may care less about the *causes* of stress, whereas those causes are at the core of the sociological approach. Scientists may care more about the exact hormones released by the stressed brain, data which in turn may be less significant to sociologists.

The legal perspective, however, necessitates attention to both causes and outcomes, which may be crucial to courts' abilities to evaluate the credibility of the stress argument and to decide what legal meaning should be assigned to it. Therefore, the following exploration of the study of stress is divided into two Subparts. The first is focused on stressors and suggests information relevant to assessing plausibility of stress arguments. The

86. HAMMOND, *supra* note 85, at vii.

87. *See, e.g.*, HANDBOOK OF STRESS SCIENCE, *supra* note 85.

88. Kathryn A. Abrams & Hila Keren, *Who's Afraid of Law and the Emotions?*, 94 MINN. L. REV. 1997, 2048 (2010) (defining "useful synthesis": "A 'useful synthesis' will sort and arrange the nonlegal knowledge in a manner which responds to the context and legal questions at hand. This means that some important theories or data will be purposefully omitted, while other facts and theories may be emphasized beyond their relative weight outside of law.").

89. The leading article, which since its publication has inspired many other works, is Leonard I. Pearlin, *The Sociological Study of Stress*, 30 J. HEALTH & SOC. BEHAV. 241 (1989). What is known as Pearlin's Stress Process has inspired much study of stress using his model and understanding. *See, e.g.*, ADVANCES IN THE CONCEPTUALIZATION OF THE STRESS PROCESS: ESSAYS IN HONOR OF LEONARD I. PEARLIN (William R. Avison et al. eds., 2010) [hereinafter ADVANCES].

90. Pearlin, *supra* note 89, at 254.

second concerns the outcomes of stress, offering tools to recognize known symptoms of stress that can further assist the plausibility evaluation. This Subpart also explains the powerful impact of stress on behavior and decisionmaking.

B. Common Stressors

Earthquake, financial crisis, death of a loved one, work overload, car accident, divorce, and incapacitating illness, to name a few, are all negative experiences that can be highly challenging to humans' well-being. Most people experiencing events or situations of these kinds are deeply affected by them, and thus those circumstances may be considered as "normatively stressful."[91] Conditions that typically cause stress are also known in the literature as "stressors," that is, the stimuli that cause stress.[92] The evolution of the "stressor" terminology to connect dissimilar human experiences has been the principal accomplishment of the pioneering stress research and a chief facilitator of the study of stress.

Efforts to create a taxonomy of stressors followed. Scientists observed that stressors come in many shapes and forms. Some, like an injury, are "acute" and short-term, while others, such as unemployment, may be "chronic" and persist over a long period of time.[93] Some are shared by many, like war, while others, such as illness or bereavement, are more individually experienced.[94] Many stressors are inescapable, like a hurricane, for example, while others may involve some level of choice, such as pursuing a divorce. Despite those distinct categories, the study of stress has shown that very different stressors can cause similar negative results to the physical, mental, and psychological well-being of individuals.[95] It is this quality of stressors that has brought some researchers to declare that stressors are "objective,"[96] emerging from verifiable characteristics of the environment and causing similar results. And indeed, while some stressors might affect people differently, certain stressors, such as the death of a loved one, are so noxious that almost every person affected experiences a similar stress. This observation, although quite elementary in the study of stress, appears quite significant to law. If bereavement, for example, is a stressor for nearly everyone, then a stress argument coming from a grieving person can be presumed to be fairly credible. Accordingly, cataloguing stressors that have a universal

91. Richard S. Lazarus & Susan Folkman, Stress, Appraisal, and Coping 14 (1984).

92. The term was coined by Selye and is used by most stress theorists. *See* Am. Inst. of Stress, *supra* note 85.

93. Lazarus & Folkman, *supra* note 91, at 14.

94. *See id*.

95. *See* Naomi Breslau & Ronald C. Kessler, *The Stressor Criterion in DSM-IV Posttraumatic Stress Disorder: An Empirical Investigation*, 50 Biological Psychiatry 699, 699 (2001).

96. *Id.*

effect may render the prima facie stress argument plausible. The study of stress does just this: It has produced *inventories of common stressors* that originate in traumatic experiences (such as rape), life-changing events (such as divorce), and chronic conditions (such as poverty).

1. Traumatic Stressors

Following the Vietnam War the American Psychiatric Association officially added Posttraumatic Stress Disorder ("PTSD") to its Diagnostic Manual of Mental Disorders ("DSM").[97] Setting standards for diagnosing the newly acknowledged disorder, the DSM defined the first criterion as an exposure to a "traumatic stressor."[98] The original purpose of this "stressor criterion" was to identify traumatic stressors that do not depend on the victim's individual reaction to events, but rather on a clinical evaluation of what would have been stressful for an imagined "average" person.[99] Importantly, creating a stressor criterion in the DSM has spurred various checklists of potential traumatic stressors.[100] For example, the Life Events Checklist ("LEC") is a seventeen-item list of events that is often used by psychiatrists applying the stressor criterion.[101] The LEC's stressors are as follows:

(1) Natural disaster (for example, flood, hurricane, tornado, earthquake)
(2) Fire or explosion
(3) Transportation accident (for example, car accident, boat accident, train wreck, plane crash)
(4) Serious accident at work, home, or during recreational activity
(5) Exposure to toxic substance (for example, dangerous chemicals, radiation)

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97. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 236 (3d ed. 1980).

98. Richard J. McNally, *Conceptual Problems with the DSM-IV Criteria for Posttraumatic Stress Disorder*, *in* POSTTRAUMATIC STRESS DISORDER: ISSUES AND CONTROVERSIES 1, 1–2 (Gerald M. Rosen ed., 2004) (offering a chronology of the DSM's approach to PTSD).

99. Breslau & Kessler, *supra* note 95, at 699. Although this initial "objective" approach was later supplemented by a subjective criterion, the diagnostic work still starts from a search for a traumatic event. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 463–64 (4th ed., Text Revision, 2000) ("Traumatic events . . . include, but are not limited to, military combat, violent personal attack (sexual assault, physical attack, robbery, mugging), being kidnapped, being taken hostage, terrorist attack, torture, incarceration as a prisoner of war or in a concentration camp, natural or manmade disasters, severe automobile accidents, or being diagnosed with a life-threatening illness.").

100. For a compressive description of many of those measuring instruments, see Suzan M. Orsillo, *Measures for Acute Stress Disorder and Posttraumatic Stress Disorder*, *in* PRACTITIONER'S GUIDE TO EMPIRICALLY BASED MEASURES OF ANXIETY 255 (Martin M. Antony et al. eds., 2001); *see also* Naomi Breslau et al., *Trauma and Posttraumatic Stress Disorder in the Community*, 55 ARCHIVES GEN. PSYCHIATRY 626, 629 tbl.2 (1998); Breslau & Kessler, *supra* note 95, at 701 tbl.1 (both using empirically a nineteen-item list that is based on the DSM's stressor criterion).

101. Although the LEC's list may seem lengthy, its importance to our topic—and more generally the importance of similar inventories of traumatic stressors—seems to justify its inclusion here.

(6) Physical assault (for example, being attacked, hit, slapped, kicked, beaten up)
(7) Assault with a weapon (for example, being shot, stabbed, threatened with a knife, gun, bomb)
(8) Sexual assault (rape, attempted rape, made to perform any type of sexual act through force or threat of harm)
(9) Other unwanted or uncomfortable sexual experience
(10) Combat or exposure to a war-zone (in the military or as a civilian)
(11) Captivity (for example, being kidnapped, abducted, held hostage, prisoner of war)
(12) Life-threatening illness or injury
(13) Severe human suffering
(14) [Witnessing] [s]udden, violent death (for example, homicide; suicide)
(15) Sudden, unexpected death of someone close to you
(16) Serious injury, harm, or death you caused to someone else
(17) Any other stressful event or experience[102]

Inventories of traumatic stressors, such as the LEC, can serve as a professional and reliable resource to assist in the evaluation of stress arguments, because they include stressors that have been professionally recognized as predicting a stress disorder. Compare, as a brief example, the stressors of Mary Ann Gascho, who was raped and beaten by her then-husband,[103] with the acknowledgment that sexual assaults (number 8 on the LEC inventory) and physical assaults (number 6) are traumatic stressors.

A possible addition to inventories such as the LEC are stressors that do not clearly meet the current threshold of the stressors criterion, but are still severe enough to raise arguments in support of their inclusion. PTSD's theorists have argued, for example, that beyond the recognized traumatic events, room should be made in the inventories for the cumulative stress that occurs in cases such as repeated harassment at work or prolonged care for a terminally ill partner.[104] Although such recommendations have yet to be accepted, even stressors that potentially result in PTSD can be evaluated as normative and universal stressors in the context of stress arguments.

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102. Matt J. Gray et al., *Psychometric Properties of the Life Events Checklist*, 11 ASSESSMENT 330, 339 (2004).

103. Gascho v. Scheurer Hosp., 400 F. App'x 978, 979–84 (6th Cir. 2010).

104. *See, e.g.*, Chris R. Brewin et al., *Reformulating PTSD for DSM-V: Life After Criterion A*, 22 J. TRAUMATIC STRESS 366, 368 (2009). *But cf.* Robert J. McNally, *Progress and Controversy in the Study of Posttraumatic Stress Disorder*, 54 ANN. REV. PSYCHOL. 229, 231–32 (2003) (warning against a conceptual bracket creep in the definition of trauma).

2. *Life Events as Stressors*

Stress theorists have shown widespread interest in the properties of events that make them stressful. Major life events, such as divorce or being fired, have been recognized as universally stressful. Throughout the second half of the twentieth century, researchers dedicated much effort to identifying those life events and assessing their relative weight as stressors. Such evaluation of events was mainly based on the amount of readjustment individuals were required to do, the events' desirability, the stressors' foreseeability, and the individuals' ability to control their occurrence.[105] One pioneering tool of measurement was the Social Readjustment Rating Scale ("SRRS").[106] The original SRRS listed forty-three such events and rated them by assigning numbers (called "life-change units")—ranging from 100 (death of spouse) to 11 (minor violations of the law)—to each of them.[107]

Crucial to the legal discussion of consenting under stress is realizing that in the cases discussed earlier, the events that triggered the individuals' stress arguments are ranked as significant stressors under the SRRS. For example: Divorce is ranked second (out of forty-three) on the list and assigned seventy-three life-change units; marriage is ranked seventh and is assigned fifty units; being "fired at work" is the eighth event on the list with forty-seven units; pregnancy is twelfth (forty units); and "change in financial state" is sixteenth with thirty-eight units.[108] Such a checklist method is based on the idea that major changes in life can be measured in an objective manner.[109] Moreover, central to the SRRS's measurement of stress level is the idea that stressors accumulate. For example, if someone who is going through a divorce also loses her job and consequently suffers financial troubles due to the two events—similar to the facts of *Gascho*[110]—the units are cumulative and add up to a total of 158 life-change units to best capture the possible magnitude of their joint impact. Although aspects of the SRRS were criticized by some stress researchers,[111] others relied on it and further refined it.[112] Despite the lack

105. *See generally* Thomas H. Holmes & Richard H. Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RES. 213, 216 tbl.3 (1967).

106. *See id.*; *see also* Sheldon Cohen et al., *Strategies for Measuring Stress in Studies of Psychiatric and Physical Disorders*, *in* MEASURING STRESS: A GUIDE FOR HEALTH AND SOCIAL SCIENTISTS 3, 3 (Sheldon Cohen et al. eds., 1995) [hereinafter MEASURING STRESS] (explaining that the SRRS belongs with the environmental approach to the study of stress, which focuses on assessment of external events or experiences that are "normatively (*objectively*) associated with substantial adaptive demands").

107. Holmes & Rahe, *supra* note 105, at 216 tbl.3.

108. *Id.*

109. Barbara Anderson et al., *Interview Assessment of Stressor Exposure*, *in* HANDBOOK OF STRESS SCIENCE, *supra* note 85, at 565, 566.

110. Gascho v. Scheurer Hosp., 400 F. App'x 978, 980 (6th Cir. 2010).

111. *See* Cohen et al., *supra* note 106, at 5–6; *see also* R. Jay Turner & Blair Wheaton, *Checklist Measurement of Stressful Life Events*, *in* MEASURING STRESS, *supra* note 106, at 36–37.

of a universally agreed-upon list of stressors,[113] the checklist methods of measuring stress are still "the dominant research procedure" used in thousands of empirical studies of exposure to stressors.[114]

The value of the flourishing study of stressful life events in general,[115] and of the use of life event inventories in particular, to our topic seems straightforward. It offers a well-researched—and empirically tested—list of stressors and a relatively practical way to evaluate the credibility of any given stress argument.

3. Chronic Stressors

In addition to short-term events, some enduring conditions produce high levels of stress. Stressors in this group are chronic, and they put humans under special demands that may lead not only to distress but also to an exhaustion of resources that—in a vicious circle—causes greater subsequent vulnerability to other stressors.[116] As opposed to the life events discussed above, the challenge here results not so much from the need to adapt to changes, it stems from the ongoing requirement of coping with difficult *unchanging* realities coming from poverty, continuous unemployment, persistent financial worries, marital troubles, disability, loneliness, and others. Chronic stressors are different from life-events stressors in the way they start, persist, and end. Specifically, they don't necessarily begin at a discrete moment, but rather may exist as a "state" or develop insidiously as a problematic, continuing condition in the social environment.[117] They often persist for a long time, with

112. Such, for instance, was the 1977 study by Mardi Horowitz and his colleagues who created the Life Events Questionnaires for measuring what they called "presumptive stress." Mardi Horowitz et al., *Life Event Questionnaires for Measuring Presumptive Stress*, 39 PSYCHOSOMATIC MED. 413, 413 (1977). The SRRS itself was updated in 1997. *See generally* Mark A. Miller & Richard H. Rahe, *Life Changes Scaling for the 1990's*, 43 J. PSYCHOSOMATIC RES. 279 (1997) (reporting updated findings with regard to the original forty-three life change events from 1965, adding data from 1977 and 1995). With the permission of the authors of the SRRS, everybody can now test and measure their stress level by taking a simple (but telling) online test. *See Life Change Stress Test*, WEBMD (May 18, 2011), http://www.webmd.com/balance/stress-management/life-change-stress-test.

113. *See* Anderson et al., *supra* note 109, at 566.

114. *Id.* (explaining that checklists are used as either a stand-alone approach or combined with a follow-up interview and maintaining that their popularity "appears to lie in the intuitive appeal of the stress concept, the assumption that 'more events are worse' and the efficiency and economy of the method"); s*ee* Pearlin, *supra* note 89, at 245 (describing life events inventories as an "inviting research tool").

115. Caroline Aldwin, *Stress and Coping Across the Lifespan*, *in* THE OXFORD HANDBOOK OF STRESS, HEALTH AND COPING 15, 18 (Suzan Folkman ed., 2010) ("Life events are most commonly studied . . . .").

116. Stephen J. Lepore, *Measurement of Chronic Stressors*, *in* MEASURING STRESS, *supra* note 106, at 102.

117. Blair Wheaton, *The Nature of Chronic Stress*, *in* COPING WITH CHRONIC STRESS 43, 53 (Benjamin H. Gottlieb ed., 1997).

fluctuating intensity, sometimes cutting through different phases of life.[118] And, unlike life events, they usually do not come to a defined end. In fact, while some chronic strains may gradually dissipate, others, such as living in a dangerous neighborhood or suffering from discrimination, may influence individuals from birth to death.[119]

Due to all those characteristics of chronic stressors, the task of organizing them in inventories and measuring their impact is a challenging one.[120] Yet as with life events, a universal aspect may be found in many of the chronic stressors. Most people will find stressful, for example, constantly lacking the money to pay the rent or mortgage, or facing frequent conflicts with their spouse or their boss. In an effort to delineate some standardization, stress theorists have found it useful to focus on chronic strains that typically arise within the contexts of "major social roles," such as work, marriage, and parenthood.[121] Difficulties at work, problems with a spouse, and worries about kids are all significant chronic stressors, according to this understanding, because of the way people are invested—physically and psychologically—in their social roles. As a result, inventories of chronic stressors tend to focus on strains at work and within the family context.[122]

Exploring patterns in inventories of chronic stressors appears valuable to the ability to assess the reasonability and credibility of stress arguments. Applying the social role idea, many people tend to share high levels of stress that arise from some of the following: (1) *overload* in fulfilling their role (be it at work or at home),[123] (2) *interpersonal conflicts* within their role (such as with their supervisor or their spouse),[124] (3) *conflicts between roles* (working parents are the prime example),[125] (4) *unwanted roles* (such as in the case of homemakers who would rather have outside employment),[126] (5) *unachievable roles* (inability to get a job, to find a spouse, or to have children as leading examples),[127] and

118. *Id.*

119. *See id*. at 69–71 (appendix).

120. *See* Pearlin, *supra* note 89, at 245 (describing the problem and suggesting focusing on those chronic stressors that occur within roles); *see also* Lepore, *supra* note 116, at 106 (pointing to the problem and reviewing available measuring instruments).

121. *See, e.g.*, Pearlin, *supra* note 89, at 245.

122. Examples in the work context include the Work Environment Scale, the Occupational Stress Inventory, and the Job Content Questionnaire. Examples in the marital/familial context include the Family Environment Scale, the Marital Situations Inventory, and the Marital Agendas Protocol. *See* Lepore, *supra* note 116, at 105–06.

123. Pearlin, *supra* note 89, at 245.

124. *Id.*

125. *Id.*

126. *Id.* (naming this category "role captivity").

127. Wheaton, *supra* note 117, at 56–57 (underscoring the importance of not having a major social role without including it in the role-oriented stressors). I believe that emphasizing the frustration of not being able to achieve a desired role better explains the connection to stress.

(6) *loss of role* (with examples that range from having to retire from work to coping with empty nest after the children have left the home).[128] To this role-oriented inventory of chronic stressors, other scholars have added more "general" strains, which cut across roles, such as residing in a dangerous area, living in an air-polluted environment, or suffering from a severe illness.[129] Stress theorist Blair Wheaton, for example, has created a sixty-item inventory that includes both role-related and more general chronic stressors.[130] That inventory can be quite useful to legal practitioners, judges, and legal theorists.

An instructive case can be that of Mr. Williams, who lived in poverty his entire life, suffered from never-ending financial troubles and found himself unable to feed his children or pay the bills when he agreed to a problematic loan agreement.[131] Realizing that Wheaton's accepted measuring instrument includes potential chronic stressors such as you "don't have the money to buy the things you or your kids need" and your "rent or mortgage is too much"[132] could have been helpful in assessing Mr. Williams's stress argument regarding his condition and his inability to give meaningful consent.

C. Individual and Social Differences Explained

Thus far we have portrayed a relatively objective picture of stressors without differentiating between individuals. However, even major stressors are not always consistent in the effects that they produce. What is it that changes the influence that similar stressors have over individuals? For the most part, such differences can be explained and analyzed. Contrary to the leading legal view, they do not demonstrate that stress is a subjective phenomenon that is random in its impact on individuals.

1. Individual Differences

Richard Lazarus's celebrated "appraisal theory of stress" explains differences in individuals' response to stressors and can offer salient guidance.[133] As distinct from the above effort to universalize stressors, which is sometimes termed "the environmental approach,"[134] the appraisal theory emphasizes that for most stressors what is highly stressful for some may not be as stressful for others.[135] The differences between individuals

128. Pearlin, *supra* note 89, at 245–46 (naming this category "role restructuring"). I believe that emphasizing the loss in the changing role better explains the connection to stress.

129. Wheaton, *supra* note 117, at 69–71 (appendix).

130. *Id*.

131. *See* Williams v. First Gov't Mortg. & Investors Corp., 225 F.3d 738, 749 (D.C. Cir. 2000).

132. Wheaton, *supra* note 117, at 69 (appendix).

133. Lazarus & Folkman, *supra* note 91.

134. *See supra* note 106.

135. Lazarus & Folkman, *supra* note 91, at 19.

are explained by their personal appraisal of the stressfulness of a given situation. Thus, in their seminal 1984 book *Stress Appraisal and Coping*, Lazarus and Folkman define stress not as an event but as "a relationship between the person and the environment that is appraised by the person as taxing or exceeding his or her resources and endangering his or her well-being."[136]

The personal appraisal process is not, however, as capricious, erratic, or unreliable as envisioned by some legal actors. It is a rich cognitive categorization practice that Lazarus and other scholars have carefully delineated in years of research. Their study focuses on two separate evaluations: an appraisal of the significance of the stressor for the concrete individual, followed by an appraisal of the resources available to that individual to cope with what is assessed to be stressful.[137] They show that those "personal" appraisals follow recognizable patterns that can be explained and that allow for intelligent investigation and analysis.[138]

a. Appraisal of Significance

Appraising the significance of stressors depends on both personal and situational factors. On the personal level, the appraisal depends on the relative importance of the stressful matter in one's life, and this importance depends on a concrete set of commitments and beliefs. As conceptualized by Lazarus and Folkman, the "deeper a person's commitment, the greater the potential threat or harm."[139] Accordingly, perceiving a matter as salient to their well-being tends to make people particularly vulnerable to stress related to that matter.[140] This principal of relative significance can be very constructive in evaluating stress arguments in legal cases. For example, a person losing her home due to foreclosure[141] or losing a job of thirty-five years[142] is probably experiencing her loss as larger than the loss of a real estate investment that has only monetary value or a temporary job. Fortunately, the concrete significance of a stressor in one's life does not require mindreading skills, but only willingness to analyze the particularities with special awareness to the linkage between significance and stress.

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136. *Id.*

137. *Id.* at 31–37. In 1984, Lazarus and Folkman decided to pragmatically continue using the terminology of "Primary Appraisal" (for appraisal of significance) and "Secondary Appraisal" (for appraisal of resources), despite their own dissatisfaction with such terminology. *See id.* at 31 (explaining the authors' doubts). Therefore, I use different terminology: "Appraisal of Significance" for their "Primary Appraisal" and "Appraisal of Resources" for their "Secondary Appraisal."

138. *Id.*

139. *Id.* at 58.

140. *Id.* at 58–59.

141. *See, e.g.*, *In re* Accredited Home Lender Holding Co., 441 B.R. 443 (2011).

142. *See, e.g.*, Gascho v. Scheurer Hosp., 400 F. App'x 978 (6th Cir. 2010).

Beyond the question of what is at stake personally, there are common situational factors that can create differences in the appraisal of stressors. It should be noted that these situational factors are all matters of fact—as opposed to internal feelings—and therefore they lend themselves to legal analysis and assessment. Many times the special weight of a stressor can be explained not by personality factors, but rather by the phenomenon of "clustering of stressors."[143] To fully appreciate the weight of stressors on the individual, decisionmakers must bear in mind how stressors accumulate, converge, and proliferate.[144] Sometimes several stressors exist independently of one another, but still have a cumulative effect. Consider, for example, being exposed to a natural disaster while being unemployed. Frequently, however, the stressors are strongly linked to each other, and several "primary stressors" lead to "secondary stressors."[145] For example, a loss of job can engender financial strains which may create or enhance marital conflicts that can end in a divorce—generating a great sense of loneliness and a new set of financial strains. As even this simplified example illustrates, occasionally the primary stressors are less acute than their consequential stressors, as the problem of stress tends to escalate over time. Moreover, stressors typically cross over individuals. Thus, your exposure to stress may be enhanced by exposure to stressors impacting people close to you.[146] An example, taken from a case in which the court rejected the stress argument, is where a borrower's ongoing financial strains were intensified by his wife's illness: Her stress spilled over and enhanced the stress in his life.[147]

Additionally, time-related situational factors often play a role in the individual appraisal of stress.[148] First, the *imminence* of a stressful event or situation matters. While surprising negative changes may be stressful, studies show that the anticipation period before the stress begins tends to enhance the stressfulness by adding the weight of anxiety and worries to the initial meaning of the nearing stressor. In those studies, the level of stress appeared to reach its peak when "there was enough time for subjects to grasp the significance of the threat, but not enough time to

143. Pearlin, *supra* note 89, at 248.

144. *See* LAZARUS & FOLKMAN, *supra* note 91, at 113 (explaining that the situation should "be considered in the context of the person's overall functioning, and in relation to what else is going on in the person's life"); *see also* Pearlin, *supra* note 89, at 247.

145. Pearlin, *supra* note 89, at 248.

146. *See, e.g.*, Melissa A. Milkie, *The Stress Process Model: Some Family-Level Considerations*, *in* ADVANCES, *supra* note 89, at 93, 96 (giving the example of a stress transfer of an ill family member whose situation inflicts stress on other family members); *see also* Nicole E. Roberts & Robert W. Levenson, *The Remains of the Workday: Impact of Job Stress and Exhaustion on Marital Interaction in Police Couples*, 63 J. MARRIAGE & FAMILY 1052, 1052 (2001) ("[J]ob stress and exhaustion can negatively impact marriage.").

147. DCR Fund I, LLC v. TS Family Ltd. P'ship, 261 F. App'x 139, 143 (10th Cir. 2008).

148. LAZARUS & FOLKMAN, *supra* note 91, at 92 ("[T]ime may be one of the most important parameters of stressful situations, yet it has been one of the most neglected areas in stress research.").

generate effective coping strategies."[149] Second, the *duration* of the stressful situation makes a difference, as suggested more generally by the study of chronic stressors. When a stressful situation persists over time, as in the case of ongoing financial strains, it is more likely to "wear the person down psychologically and physically."[150] Third, *uncertainty* or *ambiguity* about the nature of a threat, whether it will happen, and what might be done about it, may also add to the potential stress in a given situation.[151] It can increase the level of threat by limiting the individual's sense of control and by intensifying the sense of helplessness, adding a layer of anxiety that is often associated with uncertainty. Awareness of this last point may help, for example, in evaluating the credibility of the kind of stress argument made in *Satter*. In that case, an employee was sent home to await the conclusion of an investigation committee, without knowing for what she was being blamed.[152] While the court cast doubt on the stress argument by highlighting the fact that she was fully paid while sitting at home, it reflected no awareness of the ambiguity of the employee's situation as a known enhancer of stress.[153]

To sum up, we have seen how personal and situational factors can lead to the assignment of different significance to similar stressors, either enhancing or diminishing their impact. We have also seen that the particular intensity of stressors derives, however, not only and not predominantly from personal feelings. Rather, it emerges from given conditions that can be cognitively assessed. Therefore, an appropriate legal evaluation of a particular stress argument would require paying attention to particular factual elements and balancing them, a task familiar to most legal actors.

b. Appraisal of Resources

Because people have different resources, they differ in their ability to cope with stressful situations. Financial means, available familial and social support, health, energy, education, and other skills, all dictate the ability of an individual to cope with stressors.[154] Generally, stressors have greater potential to cause distress when the cognitive appraisal of the individual leads to a conclusion that there are not enough resources to cope. Lazarus and Folkman explain that the appraisal of resources

> is more than a mere intellectual exercise in spotting all the things that

149. *Id.* at 95–96 (describing experiments by Nomikos and Folkins).

150. *Id.* at 98.

151. *Id*. at 101–03.

152. Satter v. Wash. State Dep't of Ecology, No. C09-5645BHS, 2010 U.S. Dist. LEXIS 80520, at *14–15 (W.D. Wash. Aug. 10, 2010).

153. *Id*.

154. LAZARUS & FOLKMAN, *supra* note 91, at 158–59 (defining resources as "factors that precede and influence coping, which in turn mediates stress" and summarizing common coping resources).

> might be done. It is a complex evaluative process that takes into account which coping options are available, the likelihood that a given coping option will accomplish what it is supposed to, and the likelihood that one can apply a particular strategy or set of strategies effectively.[155]

The question of resources also depends on personal and situational factors. At the personal level, individuals differ in the resources available to them. When facing a cancellation of a wedding, for example, it matters greatly whether the bride-to-be is unemployed[156] or has her own savings and sources of independent income to deal with the crisis.[157] It also matters whether she is alone in this country, like Ms. Holler[158] and other foreign brides,[159] or has familial and other sources of social support. While individual dispositions—such as optimism or self-esteem—are part of the personal resources that allow or constrain the coping process (and are admittedly less amenable to external assessment),[160] most of the other personal factors are recognizable and assessable.

Situational factors can also play a role in the appraisal of resources. Time and timing, as a leading example, has much influence: While having time can allow access to personal resources such as consultation and social support, time pressure can constrain the ability to draw on resources. For example, many of the brides-to-be that were pressured to sign inferior prenuptial agreements were required to do so in the last few days before the wedding and therefore had very limited ability to cope with the stressor they were facing.[161]

c. A Summary and a Comment About Feelings

Individual differences in experiencing stress do exist, and the judicial review of a stress argument cannot remain general: It requires taking into account the concrete aspects of the problem, both personal and situational. The appraisal theory's greatest contribution may have been to the debate whether stress is objective, as suggested by inventories of common stressors, or subjective, as suggested by the fact that individuals respond differently to similar stressors. The appraisal theory suggests that both conceptions are true, but neither can fully describe the causes of

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155. *Id.* at 35.

156. *See, e.g.*, Holler v. Holler, 612 S.E.2d 469, 471 (S.C. Ct. App. 2005).

157. *See, e.g.*, *In re* Marriage of Spiegel, 553 N.W.2d 309, 311 (Iowa 1996) (bride is an educated business woman with some income).

158. *Holler*, 612 S.E.2d at 471 (bride from Ukraine).

159. *See, e.g.*, *In re* Marriage of Bonds, 5 P.3d 815 (Cal. 2000) (bride from Sweden); *see also* Friezo v. Friezo, 914 A.2d 533 (Conn. 2007) (bride from England).

160. Although scholars and experts do analyze and assess them on a regular basis. *See, e.g.*, Michele M. Tugade, *Positive Emotions and Coping: Examining Dual-Process Models of Resilience*, *in* THE OXFORD HANDBOOK OF STRESS, HEALTH AND COPING, *supra* note 115.

161. *See, e.g.*, Francavilla v. Francavilla, 969 So. 2d 522, 524 (Fla. Dist. Ct. App. 2007) (agreement signed an hour before the wedding); *see also Friezo*, 914 A.2d at 542 (agreement signed one day before the wedding).

stress. Instead, it offers a view of the process as a dynamic *transaction* between personal components and environmental elements, a mixture of objective and subjective properties.[162] This transactional model currently dominates the study of stress and admittedly requires deviation from a purely objective approach.[163] However, it should not render impossible the legal task of analyzing stress arguments. Long years of studies offer enough understanding of the patterns of individual responses to stressful events to allow informed evaluation.

Finally, the appraisal approach does not deny the place of emotions in the process. However, "emotions" under this approach are not disparaged, as in the legal approach, as merely a subjective feeling;[164] instead, emotions are conceptualized as an integral and important part of an efficient cognitive process. For example, a wife's love for her husband is a relevant factor in the appraisal of the stress caused by the husband's announcement that he wants a divorce. Without such emotion, when the wife shares the fading of affection and devotion, divorce may be unpleasant but not an experience that necessarily creates a new stressful condition. As this example shows, the question of love is relevant to the *cognitive* appraisal of the potential stressor of divorce. Indeed, the study of emotions demonstrates that emotions play a vital part in a productive cognitive process, and therefore should not be ignored.[165] So, although there is no doubt that emotions are—and indeed should be—involved in the appraisal process, it does not justify defining stress as a "feeling" that cannot by analyzed.

2. Social Differences

Another reason why stress-related arguments can still be assessed in courts despite their seemingly individuated character is the strong link between stress and *social* conditions. The social study of stress has focused on people's backgrounds to identify social patterns and to enable analysis of the structural elements that make up the stress process.[166] Inspired by Pearlin's Stress Process model, social studies have repeatedly illustrated that differences in stress experiences can often be explained by "the effects of social inequality on allocations of resources, status, and

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162. LAZARUS & FOLKMAN, *supra* note 91, at 114.

163. *See* Aldwin, *supra* note 115, at 17 (stating the dominance of the transactional model).

164. *See* Satter v. Wash. State Dep't of Ecology, No. C09-5645BHS, 2010 U.S. Dist. LEXIS 80520, at *16 (W.D. Wash. Aug. 10, 2010).

165. *See, e.g.*, ANTONIO R. DAMASIO, DESCARTES' ERROR: EMOTION, REASON AND THE HUMAN BRAIN xv (1994) (arguing that emotions are forms of intelligent awareness that are "just as cognitive as other percepts"); *see also* Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 645–49 (2011) (reviewing arguments and literature that explain how emotion plays a critical role in reasoning, rationality, and moral judgment).

166. Pearlin, *supra* note 89, at 241–43.

power."[167] Social studies research has demonstrated how social factors such as gender, race, and socioeconomic status color the stress picture and create patterned differences between individuals.[168]

a. Gender

Patterns of exposure and vulnerability to stressors seem to follow the "gender line."[169] While research shows that males are more exposed and vulnerable to stress caused by, for example, physical violence, war traumas, and unemployment, females tend to suffer from increased exposure and vulnerability to stress that rises, for instance, from sexual violence, interpersonal relationships, and caregiving duties.[170] Those patterns clearly correlate with the conventional allocation of life domains between women and men. Despite many changes in gender roles, men in the twenty-first century are still more likely to be the primary providers of the financial resources of their family and are expected by others and by themselves to fulfill that role.[171] Similarly, women are still more likely to be the primary homemakers and caretakers of children and aging adults, and are still expected (by others and by themselves) to satisfy the requirements of domestic roles.[172]

Such a gendered social setting obviously exposes more women than men to "private-life" and domestic stressors and more men than women to "public-life" and market stressors. But the differences go deeper, beyond the environments occupied by men and women, to invade individuals' internal worlds and the way they "define and evaluate themselves."[173] Individuals experience stress more in particular domains because performance in those domains is more significant in their lives and is more important to their sense of self. Thus the gendered reality modifies the *meaning* individuals assign to general stressors. It also changes the personal *resources* they use to cope with such stressors. Indeed, the study of stress has produced some findings that are relevant to the legal evaluation of stress arguments made in courts by men and women.

Perhaps the most consistent and pronounced pattern reported in the stress literature is that females are influenced more than males by

167. R. Jay Turner et al., *The Epidemiology of Social Stress*, 60 AM. SOC. REV. 104, 106 (1995).

168. *Id*. Other contexts were studied too. *See, e.g.*, Elizabeth G. Menaghan, *Work, Family and Their Intersection*, *in* ADVANCES, *supra* note 89, at 131, 131–48 (lack of education and problems of personal status).

169. *See generally* NANCY LEVIT, THE GENDER LINE (1998).

170. *See* Vicki S. Helgeson, *Gender, Stress, and Coping*, *in* THE OXFORD HANDBOOK OF STRESS, HEALTH AND COPING, *supra* note 115, at 63, 63–70.

171. *Id.*

172. *Id.*

173. Mary C. Davis et al., *Gender: Its Relationship to Stressor Exposure, Cognitive Appraisal/ Coping Processes, Stress Responses, and Health Outcomes*, *in* HANDBOOK OF STRESS SCIENCE, *supra* note 85, at 247, 247.

interpersonal stressors.[174] This important finding can be explained by females' greater exposure to and investment in interpersonal situations—such as through raising children—and even more so by their *interdependent* definition of the self, where risks to significant relationships as well as stressors encountered by close others are experienced as stressful for them.[175] Conversely, males' self-identity is more tied to an *independent* definition of self with more emphasis on autonomy and, therefore, this tends to make men less vulnerable to comparable interpersonal stressors. Such consistent empirical results—supported by at least 119 survey studies of over 83,000 individuals and never contradicted[176]—should definitely be taken into account when assessing the likelihood of sincerity when a woman is making a stress argument based on severe interpersonal problems in her life. Such reports reflect a recognized social phenomenon and not a random collection of individual sentiments, and these reports suggest that more credibility should be given to stress arguments that match those established patterns.[177]

Interestingly, job-related stressors have a different impact on the genders, one which does not precisely mirror interpersonal stressors. In fact, women usually report *more* job-related events that cause stress than men. However, before concluding that women are simply more sensitive to stress than men,[178] it should be noted that women's vulnerability arises from their general lower status at work, as "women are more often employed in occupations that entail high demands and low control."[179] Accordingly, when researchers control for occupational status and compare women and men in equivalent jobs, the differences seem to disperse.[180] One job-related stressor, however, that has greater impact on men than on women is unemployment or the loss of a job.[181] The same logic that explains women's special vulnerability to interpersonal stressors seems to be in effect when it comes to men's unemployment. Since providing for one's family and having an autonomous status is at the core of the traditional view of masculinity and at the heart of many men's self-identity, the meaning of job losses and prolonged unemployment periods appears to be more dramatic for men.[182]

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174. *Id.* at 248.

175. *Id.*; *see* Helgeson, *supra* note 170, at 67.

176. Davis et al., *supra* note 173, at 248.

177. This suggestion is based on the empirical findings and made without taking a position on the robust debate within feminist legal theory about whether women are, by biology or socialization, more oriented toward interpersonal connection than men.

178. For example, the literature shows that men are more vulnerable to traumatic stressors. *See* Davis et al., *supra* note 173, at 249–50; Helgeson, *supra* note 170, at 64–65.

179. Davis et al., *supra* note 173, at 250.

180. *Id.* at 250.

181. Helgeson, *supra* note 170, at 64, 70–71.

182. *Id.*

The distinctive experiences of stress in the lives of women and men should be considered when evaluating individual stress arguments. Gender taken as a *social* stressor may explain differences in individuals' response to stressors without making their argument "subjective" in an arbitrary sense. Consequentially, more credibility should be given, for example, when the stress argument is coming from a man that was exposed to violence or a job loss or from a woman that was exposed to sexual harassment or a harsh divorce.

b. Race

Racism is still a grave and pervasive social problem, and as such it has a significant impact on individuals' experiences of stress. Racial discrimination or other mistreatment is now accepted by stress theorists as an independent cause of chronic stress.[183] Race-related stress as an enduring condition develops in a process that begins with discriminatory events. Although the initial racist personal experiences may vary in their origins, forms, frequency, and covertness,[184] they eventually generate a general and persistent vulnerability to stress.[185] Sometimes the racist experiences are so frequent and significant that they create enduring stress in and of themselves. At other times, even a few isolated events—when joined with collective experiences and historical injustices[186]—can trigger transformations in cognition, behavior, and psychological perceptions. These events then tend to increase the vulnerability to racial stressors. An individual who was hurt by racist experiences may therefore appraise later racist events as more significant and threatening.[187] The same individual may interpret the meaning of further ambiguous episodes as "threatening instances of ethnic discrimination,"[188] even when, in the absence of these past experiences, such episodes may not appear so devastating.[189]

In addition, race may deplete coping resources. One of the damages of years of institutional, cultural, and interpersonal race discrimination is

183. *See generally* Elizabeth Brondolo et al., *Racism as a Psychological Stressor*, *in* HANDBOOK OF STRESS SCIENCE, *supra* note 85, at 167; *see also* Shelly P. Harrell, *A Multidimensional Conceptualization of Racism-Related Stress: Implications for the Well-Being of People of Color*, 70 AM. J. ORTHOPSYCHIATRY 42 (2000).

184. Those include discriminatory institutional policies, derogating messages conveyed by the media, and personal expressions of prejudice.

185. Harrell, *supra* note 183, at 54.

186. *Id.* at 46–47 (stating that stress is enhanced by collective experiences, when one perceives that the racial group with which she identifies is generally not treated fairly, and by historical injustices, when individuals believe that the group with which they identify has been historically mistreated or oppressed).

187. *See* Rodney Clark et al., *Racism as a Stressor for African Americans: A Biopsychosocial Model*, 54 AM. PSYCHOLOGIST 805 (1999).

188. Brondolo et al., *supra* note 183, at 171.

189. Harrell, *supra* note 183, at 45.

a segregated reality. Minorities are more likely than other groups to live in impoverished areas in which the environmental conditions include poor education, relative lack of social support, scarce recreational opportunities, and inadequate health services.[190] Clearly, such an impoverished reality not only creates more stressors, but also plays a role in draining coping capabilities. Maya Angelou opens her story *Wouldn't Take Nothing for My Journey Now* with a compelling description of such race-related stressful reality. She writes, "In 1903 the late Mrs. Annie Johnson of Arkansas found herself with two toddling sons, very little money, a slight ability to read and add simple numbers. To this picture add a disastrous marriage and the burdensome fact that Mrs. Johnson was a Negro."[191]

To make things even worse, the racial stress itself, by its own toxic nature, not only impairs environmental and social resources, it also tends to disrupt and weaken the most personal coping resources such as self-esteem, agency, and hopeful disposition.[192] Moreover, because racism is "an uncontrollable stressor," it often leads people to develop a sense of helplessness that further limits their resilience.[193] Finally, since racism is frequently associated with depressive symptoms—and depression is known to reduce social participation, cognitive flexibility, and energy—many minority individuals are even less equipped to cope with the many stressors in their lives.[194]

Because of chronic race-related stressors and race-related limited coping resources, non-white individuals arguing that they were encumbered by stress should not be heard as voicing an individual and subjective claim. Rather, the place of race as a *social* stressor should be acknowledged and taken into account in evaluating the credibility and intensity of stress arguments made by minorities.

c. Socioeconomic Status and a Summary

Low social status also creates or enhances stress, as it impairs coping resources. Generally, exposure to stressors and problems in coping with them increase "as one goes down the social hierarchy."[195] This has much

190. *Id.* at 46.

191. MAYA ANGELOU, *New Directions*, *in* WOULDN'T TAKE NOTHING FOR MY JOURNEY NOW 19, 21 (1994).

192. *See* Clifford L. Broman et al., *The Experience and Consequences of Perceived Racial Discrimination*: *A Study of African Americans*, 26 J. BLACK PSYCHOL. 165–79 (2000) (reporting lower levels of perceived mastery); Vanessa M. Nyborg & John F. Curry, *The Impact of Perceived Racism: Psychological Symptoms Among African American Boys*, 32 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 258, 259 (2003) (reporting higher levels of hopelessness in Black adolescents).

193. Brondolo et al., *supra* note 183, at 177.

194. *Id.*

195. Tarani Chandola & Michael G. Marmot, *Socioeconomic Status and Stress*, *in* HANDBOOK OF STRESS SCIENCE, *supra* note 85, at 185, 192. *See* Turner et al., *supra* note 167, at 115 ("[T]hese results support the conclusion that exposure to stress tends to occur differentially for those differently

to do with the lack of control that characterizes a lower social status; it causes greater vulnerability to stress due to universal reasons, such as economic and social powerlessness, and to more personal reasons such as lower self-confidence.[196]

To summarize this social dimension of stress, the individual experience of stress is seldom merely personal and is rarely unique. Strong social pressures emerging from defined contexts such as gender, race, and social status create patterns of difference. Moreover, studies have shown that the accumulation of such social factors—as in the case of single mothers[197]—adds depth and weight to the problem. Appreciating what theorists have called "the social distribution of stress"[198] can assist decisionmakers seeking to evaluate the credibility of stress arguments; it can free them from the limiting notion that stress is too private, subjective, and internal to be assessed.[199]

D. Outcomes of Stress with a Focus on Consenting

Prolonged stress can produce both immediate and longer-term consequences that run the gamut from the physiological, to the cognitive, to the psychological. In many disciplines, the study of stress has mainly focused on the negative effect of distress on people's health and well-being. Years of studies have produced a body of findings too vast to be summarized here.[200] Instead, this Subpart will first explore particular biological outcomes of stress that can potentially inform the legal approach to stress arguments. It then will focus on the impact of stress on an individual's decisionmaking process, which can lead a party to consent to a contract that she might otherwise not accept.

1. The Biological Outcomes of Stress

The biological study of the outcomes of stress makes clear that legal actors can no longer describe stress as a feeling. In fact, research has shown

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situated in the social hierarchy.").

196. Thompson, *supra* note 84, at 128–29 (citing studies of baboons, dogs, human beings in the Postal Service, and others that associate lower status and lower sense of control with higher levels of stress).

197. William Avison's interesting body of work focusing on single mothers offers a vivid example of the accumulation of social stressors. His studies show that single mothers suffer from the combination of stressors typical to gender, low social status, and often race, and therefore are significantly more exposed and vulnerable to stress. *See, e.g.*, William R. Avison, *Family Structure and Women's Life: A Life Course Perspective*, *in* Advances, *supra* note 89, at 71–92.

198. Turner et al., *supra* note 167, at 106.

199. Research focusing on personality differences highlights two main qualities that make some people more resilient than others to stress: hardiness and having a sense of control (or mastery). *See, e.g.*, Lazarus & Folkman, *supra* note 91, at 212.

200. It shows, inter alia, that distress is strongly associated with a variety of severe diseases, with speeding the aging and the death of brain cells, and with the development of mental illness. *See, e.g.*, Shawn Talbott, The Cortisol Connection: Why Stress Makes You Fat and Ruins Your Health—And What You Can Do About It 81 (2007).

that the chain of dichotomies shaping traditional western thinking simply do not work in the context of stress. Pairs of concepts—such as body/soul, reason/emotion, physiology/psychology, and objective/ subjective—are never opposites when it comes to stress. Rather, the concepts overlap and interrelate such that they cause changes to numerous human systems. Think, for instance, about a family man under threat of losing his job. When his brain perceives the stressful events, its cognitive appraisal of the situation triggers a chemical response: the release of a cascade of "stress hormones"—such as adrenaline and cortisol.[201] Those hormones then "initiate a series of other chemical changes, as well as physiological, cognitive, emotional, physical, and behavioral changes."[202] Now the man may suffer from some *physical* symptoms, such as headaches, lack of sleep, weight gain, and higher blood pressure. All of these are known results of overexposure to stress hormones. Psychologically, he may also become less patient with the people around him, more moody, perhaps even depressed, and this might add to the work-related situation or to personal problems at home. If the problems persist and become chronic, the constant presence of stress hormones will cause additional physiological and psychological problems. Those may include an inability to turn off the stress response, leading to even more exposure to those hormones.[203] Thus, at the most fundamental level, recognizing the connection between stressful situations and overexposure to stress hormones can help legal actors conceptualize the problem of stress as much more than a feeling. The next step is to recognize the common *symptoms* of overexposure to stress hormones, which can assist both in structuring and in evaluating stress arguments.

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201. For the evolutionary role of adrenaline and cortisol as essential to the known "flight or flight" mechanism, see *id.* at ch. 3; *see also id.* at 31 ("Adrenaline is responsible for the 'up' feeling that causes excitement, while cortisol is responsible for modulating the way our bodies use various fuel sources."). Adrenaline, also known by its American name, epinephrine, is one of the two main hormones secreted in response to stress by the sympathetic nervous system (the other one being noradrenaline). Cortisol is one of the most known hormones in a group of hormones called "glucocorticoids" that are secreted by the adrenal gland following the release of special hormones in the brain. The full description of the different hormones that play a role in times of stress is beyond the scope of this Article. Robert Sapolsky offers a fascinating detailed explanation to general audiences. In a nutshell, once a stressor is recognized, two waves of hormonal response follow: "Epinephrine acts within seconds; glucocorticoids back this activity up over the course of minutes or hours." ROBERT M. SAPOLSKY, WHY ZEBRAS DON'T GET ULCERS: THE ACCLAIMED GUIDE TO STRESS, STRESS-RELATED DISEASES, AND COPING, 30–31 (3d ed. 2004) ("Together, glucocorticoids and the secretions of the sympathetic nervous system (epinephrine and norepinephrine) account for a large percentage of what happens in your body during stress."). For the sake of simplicity, those waves of hormones with their orchestrated secretion will hereinafter be called "the stress hormones."

202. THOMPSON, *supra* note 84, at 114.

203. *Id.* at 116.

a. Insomnia

Chronic inability to sleep is a known result of stress, and it can be explained by high levels of stress hormones. Biologist Robert Sapolsky's acclaimed and fascinating book *Why Zebras Don't Get Ulcers*[204] emphasized this symptom,[205] adding that "75 percent of cases of insomnia are triggered by some major stressor."[206] As Sapolsky maintains, "stress not only can decrease the total amount of sleep but can compromise the *quality* of whatever sleep you do manage."[207] The connection between stress and sleeping problems is explained by the fluctuating levels of cortisol in our bodies. Under normal conditions, the highest levels of this stress hormone are present in our bodies during the early morning, helping us to wake up and face the tasks of the day.[208] Those levels are supposed to decline throughout the day, eventually allowing us to calm down enough when the time comes to get some sleep.[209] However, chronic stress prevents this healthy decline of cortisol and causes high levels of it all day long, leading to interrupted sleep.[210] A vicious circle follows: Sleep deprivation is not only a symptom of stress, but also a universal stressor that in turn contributes to even higher levels of cortisol and, therefore, more problems sleeping.[211] Recognizing insomnia as a symptom of stress could have been useful in *Gascho*, in which the plaintiff's stress argument was supported by undisputed evidence regarding a severe—and professionally medicated—sleeping problem.[212] Accordingly, the scientifically documented "cortisol connection" between stress and sleeping problems could assist courts in the evaluation of stress arguments in cases that include proven insomnia.

b. Depression

Another known symptom of stress that is associated with excessive stress hormones is depression. Sapolsky's work has highlighted this tight tie,[213] and as more recent works show, "it is evident that an inexorable link

204. SAPOLSKY, *supra* note 201.

205. *Id.* at 226–38.

206. *Id.* at 236.

207. *Id.*

208. TALBOTT, *supra* note 200, at 99.

209. *Id*.

210. *Id*.

211. SAPOLSKY, *supra* note 201, at 227 ("Not getting enough sleep is a stressor; being stressed makes it harder to sleep. Yup, we've got a dread vicious cycle on our hands.").

212. Gascho v. Scheurer Hosp., 400 F. App'x 978, 980 (6th Cir. 2010) (noting that, at the time of contracting, Ms. Gascho was taking Lunesta, Ambien, Benadryl, and Ultram to help her sleep). *See* Satter v. Wash. State Dep't of Ecology, 2010 U.S. Dist. LEXIS 80520, at *16 (W.D. Wash. Aug. 10, 2010) (reporting a stress reaction that included an inability to sleep).

213. *See generally* SAPOLSKY, *supra* note 201, at 271–308 (discussing the strong ties of stress and depression); *see also* TALBOTT, *supra* note 200, at 23 (describing the linkage between over- and under-

exists between stress and depression, and new research has dramatically increased our understanding of the relationship between the two."[214] This strong bond between stress and depression is critical to our topic in at least two ways. First and most basically, since distressed parties seeking relief sometimes present evidence with regard to their diagnosed depression, realizing that stress often causes depression can make their argument significantly more credible. As with stress, depression is not merely a feeling, and although we all get truly upset from time to time, diagnosed depression is different: It is a medically acknowledged disease with severe, sometimes life-threatening, consequences.[215] Thus, when a party describes high levels of stress that led to a diagnosis of depression, courts can benefit from the rapidly accumulating knowledge that shows how typical such a connection is.[216]

Second, when people are under stress combined with depression, there is very little they can actively do. There is a proven connection between stress, depression, and impaired agency. A frequent feature of major depression is "psychomotor retardation"—a severe decrease in the ability to concentrate or act, which makes even simple activities, such as making an appointment or getting dressed in the morning, exhausting and nearly impossible to accomplish.[217] Furthermore, stress and depression are also associated with cognitive "learned helplessness,"[218] that is, an inclination to surrender to one's situation out of "a distortive belief that there is no control or outlets in any circumstance."[219] Studies have shown that by overgeneralizing the meaning of a particular stressful situation, the distressed tend to extend the original helplessness and conclude that there is nothing that can be done even if others can see possible paths of action.[220] Given the impact of stress and depression, it is much more explicable why the alternative to "stand pat and fight," which many courts view as reasonable,[221] is quite clearly out of the realm of possible responses for many of those who are depressed.

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exposure to cortisol and stress-related depression).

214. David A. Gutman & Charles B. Nemeroff, *Stress and Depression*, *in* HANDBOOK OF STRESS SCIENCE, *supra* note 85, at 345, 353.

215. The study of depression is, of course, beyond the scope of this Article. However, it seems to me as if the legal disregard of depression has a high correlation to the legal disregard of stress.

216. Stress arguments are often accompanied by arguments and evidence regarding depression. Currently many courts disregard that aspect of the argument even when the depression is severe and well proved. For a recommendation of a different approach, see *infra* Part III.

217. SAPOLSKY, *supra* note 201, at 275.

218. *See generally* MARTIN E. P. SELIGMAN, HELPLESSNESS: ON DEPRESSION, DEVELOPMENT, AND DEATH (1975) (one of the most influential works in psychology in general and the definitive book on the subject of learned helplessness in particular); s*ee also* SAPOLSKY, *supra* note 201, at 494–95 (offering a review of learned helplessness literature in the context of stress and depression).

219. SAPOLSKY, *supra* note 201, at 305.

220. *Id.* at 301–02.

221. *See supra* note 39 and accompanying text.

2. *Stress and Impaired Decisionmaking*

Consenting to a contract is a product of a decisionmaking process. Such a view is supported by the legal doctrines of duress, unconscionability, and undue influence—in their shared requirement that the party seeking relief prove she has no reasonable alternative to agreement. Understanding the impact of stress on the effectiveness of that decisionmaking processes and any available alternatives to agreeing is thus important. As we shall now see, when stress is present the legal presumption that the availability of alternatives means that the consenting party made a meaningful choice is frequently unsound.

a. The General Effect of Stress on Decisionmaking

Some stress studies show that prolonged stress can "wreak havoc with decision making."[222] Although the intersection of decisionmaking models and stress theories is yet to be fully developed,[223] stress theorists believe that chronic stress can lead to dysfunctional decisionmaking.[224] Specifically, judgments made under stress are limited because the brain is consumed by the need to cope with the stressors and their outcomes.

Studies of the impact of stress on cognition began following World War II and resulted in an expressed consensus that the "competence of human judgment is decreased by stress."[225] Only the recent development of the neurosciences, however, has allowed researchers access to the processes in the brain triggered by exposure to stress. The current findings, albeit not conclusive, reveal how stress impairs high-order brain abilities that are essential for effective decisionmaking—specifically, those operations performed by the prefrontal cortex ("PFC"). Under non-stress conditions, the PFC orchestrates the "intelligent regulation of behaviour, thought and emotion."[226] Under conditions of psychological stress, however, stress hormones interfere with that regulation.

Evolutionarily geared to prepare the body for a fight-or-flight response,[227] those hormones limit the ability of the brain to do other, less urgent tasks. Specifically, they work to limit memory and attention regulation as well as other complex brain activities performed by the

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222. THOMPSON, *supra* note 84, at 117.

223. HAMMOND, *supra* note 85, at 25–27 (describing the gulf that separates theorists of stress from decisionmaking researchers).

224. *See* Eduardo Dias-Ferreira et al., *Chronic Stress Causes Frontostriatal Reorganization and Affects Decision-Making*, 325 SCIENCE 621, 621–25 (2009).

225. HAMMOND, *supra* note 85, at 6. *See generally* IRVING L. JANIS & LEON MANN, DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT (1977).

226. Amy F. T. Arnsten, *Stress Signaling Pathways That Impair Prefrontal Cortex Structure and Function*, 10 NAT. REV. NEUROSCI. 410, 411 (2009).

227. *Id.* at 412.

PFC.[228] Therefore, under stress conditions, the amount and quality of information we can recall, process, and store declines.[229] At the same time, the high levels of stress hormones strengthen the function of other regions of the brain; the hormones released under stress "switch the brain from thoughtful, reflective regulation by the PFC to more rapid reflexive regulation by the amygdala and other subcortical structures."[230] While such a brain process may be efficient when people are under a physical threat, it is fundamentally detrimental when they are expected to make rational choices requiring analysis, self-control, and long-term thinking.[231] It can lead to dysfunctional decisionmaking.[232]

b. The Specific Impact of Stress on the Evaluation of Alternatives

Since the legal analysis of decisions made under stress depends on the analysis under the reasonable alternative test, understanding the impact of stress not only on the final decision, but also more particularly on one's ability to recognize and assess existing alternatives, becomes important. While careful appraisal of alternatives is essential to every appropriate decision,[233] it is very difficult to sustain under stress when one "can't think straight."[234] Again, the problem stems from the release of stress hormones. They cause arousal that in turn creates "hypervigilance": hasty and impulsive patterns of behavior that lead to ineffective decisionmaking. Such patterns were observed in an experimental study that focused specifically on the way stress influences the scanning and consideration of available alternatives.[235]

The alternatives study compared "the manner in which stressed and unstressed individuals consider and scan decision alternatives,"[236] and it is often cited in the decisionmaking literature to explain how stress limits the ability to choose between alternatives.[237] One hundred and one

228. *Id.*

229. THOMPSON, *supra* note 84, at 136.

230. Arnsten, *supra* note 226, at 415.

231. *Id.* In addition, chronic prolonged stress may even lead to structural, longer term changes in the PFC. *Id.* at 418–19.

232. *See* Dias-Ferreira et al., *supra* note 224.

233. Irving L. Janis, *Decisionmaking Under Stress*, *in* HANDBOOK OF STRESS: THEORETICAL AND CLINICAL ASPECTS 60 (Leo Goldberger & Shlomo Bereznitz eds., 2d ed. 1993) (describing the vigilance that is required to cope with stress and stating that vigilance exists when "the decision maker searches painstakingly for relevant information . . . and appraises alternatives carefully before making a choice").

234. THOMPSON, *supra* note 84, at 159.

235. *See generally* Giora Keinan, *Decision Making Under Stress: Scanning of Alternatives Under Controllable and Uncontrollable Threats*, 52 J. PERSONALITY & SOC. PSYCHOL. 639 (1987).

236. *Id.* at 640.

237. *See, e.g.*, HAMMOND, *supra* note 85, at 170–76, 216; Dan Zakay, *The Impact of Time Perception Processes on Decision Making Under Time Stress*, *in* TIME PRESSURE AND STRESS IN HUMAN JUDGMENT

students participated in the study and took a computerized multiple-choice analogies test containing fifteen questions.[238] Students were asked to choose the correct answer out of six alternatives presented separately on the screen.[239] They were able to navigate freely between the reviewed alternatives and to control both the order and the speed of their review.[240] To choose one of the alternatives, the students had to press the enter key, which then prompted the display of the next question on the screen.[241] The time that the students spent reviewing each alternative as well as the sequence by which the alternatives were visited were recorded. The goal was mainly to trace the method of deciding rather than to simply measure the quality of the end result. The participants were randomly divided to groups: Some were only asked to do their best, while others had to take the test under stress created as part of the experiment.[242] Importantly, the stressed participants were put under stress without using time pressure: They were free to review each alternative for as much time as they needed and to revisit alternatives that seemed to require more attention. Instead, the stressor chosen for this study was the threat of electric shock.[243] While time pressure would predictably yield a rushed style of decisionmaking,[244] it may be less comprehensible how being under a different kind of stress impacts the analysis of alternatives.

The results of the alternatives study were remarkable. The participants under stress demonstrated a significantly inferior performance compared to their non-stressed counterparts. First, stress had the detrimental effect of "premature closure," defined as making a decision before all available alternatives were considered.[245] Although few non-stressed participants engaged in premature closure, 80% of the cases in which alternatives were ignored occurred among the distressed subjects.[246] In fact, many of those subjects "chose an answer before they had even seen the correct alternative."[247] The study's findings regarding premature closure lend support to works describing the effect of stress on attention in which the cognitive process is impaired by a "tunnel

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AND DECISION MAKING 60 (Ola Svenson & A. John Maule eds., 1993).

238. Keinan, *supra* note 235, at 640.

239. *Id*.

240. *Id*.

241. *Id*.

242. *Id*. at 641.

243. *Id*.

244. Much work has been dedicated to time pressure as a stressor that impairs decisionmaking. *See, e.g.*, JANIS & MANN, *supra* note 225, at 59 (examining the role of imminence within the context of decisionmaking processes and stating that the quality of decisionmaking depends on the answer to the question: "Is there sufficient time to make a careful search for an evaluation of information and advice?"); *see also* LAZARUS & FOLKMAN, *supra* note 91, at 93.

245. Keinan, *supra* note 235, at 639.

246. *Id.* at 642.

247. *Id.* at 643.

vision," that is, an inclination to only focus on limited dimensions of a given problem.

Second, stress also caused "nonsystematic scanning," defined as a disorganized and scattered method of review in which the stressed decisionmaker "searches frantically for a way out of the dilemma, and rapidly shifts back and forth between alternatives."[248] Recording every departure from a serial sequence of review,[249] the study demonstrated significantly deficient scanning patterns in the distressed groups. Compared to the non-stressed participants, subjects under stress visited the alternative answers in a much more scattered and disordered fashion.[250]

Finally, in terms of "quality of performance," defined as choosing the right answers, subjects under stress decided incorrectly at a higher rate than their counterparts.[251] Notably, the distressed were not simply wrong more often. The study also showed a strong correlation between incomplete patterns of scanning of alternatives and decreased quality of performance: 67% of the cases of premature closure, for example, led to choosing an incorrect answer.[252] This last point has a palpable link to the legal stress argument. Typically, parties seeking relief and stress-sensitive judges attempt to explain the mistaken decision to consent to a disadvantageous contract by the failure to engage in an appropriate consideration process. The alternatives study supports the reasonableness of that argument.

The alternatives study demonstrates that stress significantly impairs the consideration of alternatives and leads to flawed decisions.[253] The application of these findings to the evaluation of contractual stress arguments in general, and more specifically to the "reasonable alternative" test, is notable. It suggests that judges may base their conclusions regarding the quality of apparent consent on alternatives not truly available to distressed individuals. Such a possibility clearly undermines the conventional presumption that the "reasonable alternative" test is objective. It thus also suggests that the application of the alternative test to distressed individuals requires adjustment to take into account the fact that stress distorts the "consenter's" understanding of such alternatives.

All in all, this Part has shown that the conventional legal analysis of consenting under stress cannot be reconciled with the results other disciplines have produced in their study of stress. The conflict mainly exists

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248. *Id.* at 639 (citing Janis, *supra* note 233, at 72).

249. *Id.* at 641 (explaining the measurement of that aspect of the performance).

250. *Id.* at 642.

251. *Id.*

252. *Id.*

253. Although the nature of the experiment did not require lengthy consideration of each of the alternatives, other works also demonstrate that stress shortens the time dedicated to the assessment of each alternative. *See id.* at 640–43 (discussing "temporal narrowing").

around the two pillars of the conventional legal analysis: (1) classifying the condition of stress as a subjective feeling, and (2) refusing relief whenever reasonable alternatives seem to have been available. While some immediate legal implications were already discussed in this Part, the goal of the next Part is to further *integrate* the non-legal knowledge with the legal issue.

III. INTEGRATION: STRESS-SENSITIVE CONTRACTUAL ANALYSIS

So far we have seen how the problem of consenting under stress is disregarded in most courts or—in rare cases—is recognized in an under-theorized manner. We have also seen how other disciplines have studied the human condition of stress, coming to cogent conclusions about stressors and their impact. The goal of this Part, therefore, is to *integrate* the discussions and to offer a stress-sensitive contractual analysis of the problem of consent under stress. In general, the task calls for both a theoretical and practical discussion. Theoretically, the study of stress illuminates the ways the tenets of consent and fault—which are fundamental under contract law—play out in the context of agreements made under stress. The practical question is how willing legal actors, from lawyers to judges, can utilize the knowledge about stress to improve the legal response to this condition. I now turn to those two aspects of the integration task.

A. THE STUDY OF STRESS AND THEORIES OF CONTRACT LAW

The contractual discourse on stress arguments circles around two leading ideas—quality of consent and level of fault. When a stress argument is made, courts have to strike a balance between those ideas, as they stand in conflict and typically reside with opposing parties: defective consent on the side of the distressed party seeking relief versus some fault on the side of the unstressed party who is insisting on enforcement. More often than not, judicial concern for finding enough fault trumps the judicial concern about flawed consent and therefore the stress argument is dismissed.[254] It is therefore imperative to re-examine both the role of consent and the notion of fault in light of the understanding of stress. I argue that a new balance is required because under stress a person's consent is "weaker" and the fault of the other party is "stronger" than what courts have thus far considered.

254. ALAN WERTHEIMER, COERCION 53 (1987) (arguing that the modern doctrine of duress can be seen as being more about "wrongness and unfairness" than about "freedom and voluntariness").

1. Stress and the Problem of Consent

In contrast to the ideal of freedom of contract, the consent produced under stress may no longer reflect a free choice or a true exercise of the human will. Rather, stress typically constrains and distorts the process of decisionmaking, producing a defective form of consent that can hardly justify enforcement. When we recognize the toll of stress on the quality of consent, two contrasting reactions come to mind. On the one hand, it can be argued—following Judge Posner's reasoning[255]—that contract law does not and should not care about the *quality* of consent once it has been given. According to this line of thought, consent is understood in absolute terms, as either perfectly present or completely missing. Arguably, an expression of consent functions in a dichotomous world and is either valid or invalid (if coerced by the other party). Such a view denies the possibility that non-coercive or less-than-coercive conditions can create an act of consent that does not amount to a meaningful consent.

On the other hand (and in opposition to Judge Posner's reasoning), it can be argued that contract law—being the field of law based on voluntary choices and consent[256]—must examine not only the existence of consent, but also the actual quality of consent. Accordingly, many shades of consent—on the spectrum between perfect consent and coerced consent—exist. And, consequentially, some higher levels of impaired consent should not be sufficient for the enforcement of contracts, even if they were not fully produced by the fault of the other party.

In choosing between those two distinct approaches, it should be noted that, as a descriptive matter, the modern law of contracts does not confirm the first, Posnerian view. Instead, the modern law of contracts reflects some sensitivity to the quality of consent, beyond its mere existence. In fact, all the contractual defenses, which reflect acknowledged reasons to avoid enforceability, can be explained by the need to recognize the problem of defective consent.[257] As a result, children,[258] mentally ill individuals,[259] alcoholics,[260] parties operating under mistake,[261] those who

255. *See supra* notes 25–32 and accompanying text (discussing the *Selmer* case).

256. *See* Brian H. Bix, *Contracts*, *in* THE ETHICS OF CONSENT 251, 266–67 (Franklin G. Miller & Alan Wertheimer eds., 2010) (portraying consent as the essence of contract law and discussing consent theories of contracts); *see also* Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 270 (1986) (proposing that the moral basis of a contract is founded on the consent of the parties to exercise rights and assume duties).

257. Bix, *supra* note 256, at 257; *see* WERTHEIMER, *supra* note 254, at 233 ("Hard choices are importantly different from other choices. They have a particularly severe constraining effect"); Peter Birks & Chin Nyuk Yin, *On the Nature of Undue Influence*, *in* GOOD FAITH AND FAULT IN CONTRACT LAW 57, 58 (Jack Beatson & Daniel Friedmann eds., 1995) (arguing that the doctrine of undue influence is about impaired consent, not about wicked exploitation).

258. RESTATEMENT (SECOND) OF CONTRACTS § 14 (1981).

259. *Id.* § 15.

260. *Id.* § 16.

are dependent on others,[262] or those who are lacking in bargaining power[263] may get relief under our conventional law, despite their apparent consent.[264] What all those examples have in common is the tenet that meaningful consent—and not simply a token of consent—is required to have a valid contract. Moreover, although the current Restatement avoids choosing between a focus on deterring bad behavior and on the quality of consent, the first Restatement emphasized the importance of free will[265] and, at least in one jurisdiction, taking advantage of the other party's stress is explicitly covered by the law of duress.[266]

At the normative level, the question becomes more challenging: Should contract law care about cases in which the consent does not represent a true will? In her analysis of the concept of consent, Robin West has suggested that we are all too quick to assume that consensual acts, such as entering into contracts, reflect a true choice made by the consenting party.[267] In reality, she argues, many consensual acts only mean that outright coercion has not occurred.[268] And, as West puts it, "[t]hat it is consensual doesn't tell us that it is harmless, or good, or beneficial. . . . It still might have been exploitative, alienating, or grossly unfair."[269] In the context of consenting to have sex, West suggests that agreeing to an arrangement that is unfair or harmful can reside in an overlooked place

261. *Id.* § 153.

262. *Id.* § 177.

263. *Id.* § 208.

264. *Cf.* Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 218 (2009) ("[M]odern contract law, at least as presently constructed, will not be able to remedy [problems of defective consent] effectively using its expanded policing doctrines.").

265. *Compare* RESTATEMENT OF CONTRACTS § 492 (1932) ("Duress . . . means . . . any wrongful threat of one person by words or other conduct that induces another to enter into a transaction under the influence of such fear as precludes him from exercising free will and judgment, if the threat was intended or should reasonably have been expected to operate as an inducement."), *with* RESTATEMENT (SECOND) OF CONTRACTS § 175 ("If a party's manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim."). Interestingly, the comment following the first Restatement's definition stressed the need to protect the vulnerable from agreeing to contracts that they are not interested in. In its relevant part it reads:

> The question is rather, did it put one entering into the transaction in such fear as to preclude the exercise by him of free will and judgment. Age, sex, capacity, relation of the parties, attendant circumstances, must all be considered. Persons of a weak or cowardly nature are the very ones that need protection. The courageous can usually protect themselves; timid persons are generally the ones influenced by threats, and the unscrupulous are not allowed to impose upon them because they are so unfortunately constituted.

RESTATEMENT OF CONTRACTS § 492 cmt. a.

266. The courts of Illinois, for example, define duress as the imposition, oppression, undue influence, or *taking of undue advantage of the stress of another* whereby one is deprived of the exercise of his free will. *See* Pierce v. Atchison, Topeka & Santa Fe Ry. Co. 65 F.3d 562, 569 (7th Cir. 1995).

267. *See* Robin West, *Sex, Law, and Consent*, *in* THE ETHICS OF CONSENT, *supra* note 256, at 221.

268. *Id.*

269. *Id*. at 234.

on the spectrum—one that lies between consenting to something that is good (pleasurable sex) and consenting due to coercion (rape).[270] In this unnoticed middle ground, we find what West calls the "unwanted consent": consenting to something one does not desire.[271] People often consent despite themselves, with different degrees of reluctance, for a variety of reasons that make consenting better than refusing.[272] Stress, I argue, produces such unwanted consent. And since it is inferior to the ideal meaningful consent, which expresses human will and freedom, it should not be subject to the same legal presumption of validity that is offered to fuller consent. Rather, impaired consent calls for a more careful and contextual response, one that aspires to place any given case somewhere on the spectrum between full consent and full coercion.

To clarify: I am not arguing that every point on the above spectrum justifies relief. In some cases, impaired consent should be tolerated, as it reflects the imperfect human condition and the need to allow markets to function. In other situations, however, the given consent represents too dangerous a sacrifice. Compare, for example, the following demonstrations of assent: first, one's automatic consent to a long form contract for a sale of goods; second, one's reluctant consent to a pay cut in a difficult economy; and third, one's consent to resign a job and release her employer from liability after being sexually harassed.[273] In all three cases, consent has been expressed, but its quality has been admittedly compromised. The cases reflect, however, different places on the spectrum. In the first example of the form contract, we can assume some desire for the purchased goods without true consent to the terms of getting them. In the second example, the pay-cut agreement is further away from full consent because both the goal of the contract and its terms are unwanted. Finally, the "resign and release" agreement in the third example is the most problematic because it involves a compromise in the consenting party's state of mind—in addition to the contract's unwanted terms and results. The study of stress is valuable in calling attention to such "third-degree" cases of impaired consent. It cautions us against treating them as similar to other cases of compromised consent: In those cases of consenting under stress, there is an appearance of consent, but in terms of the necessary state of mind, we are dangerously close to having no consent at all.

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270. *Id.* at 235.

271. *Id*. at 246–47.

272. In fact, many commentators have convincingly argued that for a host of reasons—from lack of awareness, to lack of alternatives, to cognitive biases—meaningful consent is almost always absent and therefore reflects the ideal exception rather than the norm. *See, e.g.*, Bix, *supra* note 256, at 251.

273. The last scenario is based on the facts of *Meyers v. Trugreen, Inc.*, No. 03 C 7570, 2004 U.S. Dist. LEXIS 9200, at *7–8 (N.D. Ill. May 21, 2004).

There is a distinct risk in enforcing the products of severely impaired consent, and it goes beyond the unfair terms of the deal. Under stressful conditions, the contractual process itself is injurious, and the lack of an appropriate legal process or remedy exacerbates the harm. Consenting due to desperate conditions damages a person's integrity and sense of self-sovereignty.[274] The distressed individual might internalize the message that her anguish and true wishes do not matter in courts of law. This in turn makes the contractual experience highly *alienating*, separating the pains of personhood from the legal act of consent and—by way of enforcement—allowing exploitation.[275] In other words, without an appropriate legal process or remedy, consenting under stress can be more than immediately disempowering: It entails damage to the self-image of the distressed and further deepens her powerlessness.

For example, litigation over divorce settlements illustrates the unique damage that follows from failing to recognize the category of impaired consent. Under the pressure of divorce, women often sign harmful divorce settlements, and later courts often reject their request for relief. Specifically when responding to stress arguments by divorced women, courts deny the possibility that stress could create impaired consent. Consider, for example, the following statement: "While [the] wife's fear that she may lose custody of her children no doubt caused her anxiety, we do not recognize this as a factor impairing her ability to exercise her free will and make a meaningful choice."[276]

Even though courts frequently admit the stressfulness of divorce, they treat it as "normal" and "common," and therefore as a condition that does not negate consent. Consequently, they fail to discern the situations in which the stress was so severe that it led to impaired rather than sufficient consent. Penelope Bryan studied many cases of divorce settlements and has convincingly argued that women pay the price for that judicial approach.[277] In the part of her study that focuses on the refusal to release women from their own apparent consent, Bryan explains that courts fail to protect women because they refuse to recognize gender differences in the experience of stress following divorce. In her words, courts "minimize wives' complaints of anxiety, depression, and mental distress, commonly noting that divorce always causes stress."[278]

Adding the study of stress to this analysis, it is important to remember that every scale of common stressors includes divorce and

274. West, *supra* note 267, at 245–47.

275. *See id*. at 234.

276. *In re* Marriage of Steadman, 670 N.E.2d 1146, 1151–52 (Ill. App. 3d 1996).

277. Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1270–73 (1999).

278. *Id.* at 1257.

ranks it high above many other stressful life events. This means that outside of law there is nothing "normal" about the level of stress in those cases, which is known to be acutely high. Furthermore, despite this common ("objective") story, the impact of divorce on individuals is not identical. Rather, with regard to gender, the study of stress proves that interpersonal stressors, such as divorce, have a heightened impact on women.[279] To compound matters, women are especially susceptible to stress-related depression that in turn further limits their coping abilities and augments, in a vicious circle, their initial distress.[280] Accordingly, it seems reasonable to see how women are more prone than men to suffer from the problem of impaired consent in the context of divorce settlements. Without awareness of this potential problem impacting consent, women's participation in this contractual process is highly damaging. As Bryan put it: "[D]ivorce settlements, contrary to popular wisdom, frequently restrict rather than enhance women's life choices by leaving them impoverished and embittered."[281]

Enforcing contracts that are based on severely impaired consent is a clear and immediate danger to those who are consenting under stress, but it is also a significant hazard to the idea of contracts and to the theoretical justification of enforcing them. A system that cannot appropriately differentiate between fully formed and defective consent may eventually lose its fundamental legitimacy.[282] As such, consent under stress that amounts to severely impaired consent should be regarded as a ground for relief and a justified reason for invalidating a contract. Nonetheless, this line of reasoning has had detractors.

Some commentators have cautioned against a liberal use of the defenses to enforceability—such as duress and unconscionability—arguing that extensive protection of weaker parties may deter market players from dealing with them, ultimately limiting the ability of weaker parties to function in a market society.[283] However, this argument is not convincing for two main reasons.[284] First, this argument predicts that even the potential award of relief would necessarily hinder the ability of the protected individuals' to create binding contracts. But this prediction is

279. *See supra* note 170 and accompanying text.

280. SAPOLSKY, *supra* note 201, at 290–91.

281. Bryan, *supra* note 277, at 1170.

282. Inspired by West's argument, *supra* note 267, I want to compare it to the damage caused by years of ignoring the problem of lack of consent to sex between married partners. More generally, a system that operates on behalf of justice—but at the same time tolerates and allows clear injustice—eventually has to change or face a loss of credibility.

283. Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 928 (7th Cir. 1983) ("It is a detriment, not a benefit, to one's long-run interests not to be able to make a binding commitment."). *See* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 306–08 (1975).

284. The question raises the broader issue of paternalism, which lies beyond the scope of this Article.

questionable: While the prospect of protection may deter some market players from contracting with the "protected," in other cases it may not. It is at least as probable that the prospect of legal relief will educate or incentivize market players to negotiate more reasonably to avoid the invalidation of their contract. As one commentator noted, the "potential husband might be interested in marrying even if the terms of his proposed premarital agreement must be made more fair."[285]

Second, this argument assumes a simplistic model of the market, where the weaker market players can easily be identified and avoided. However, while some market players may develop a preference not to deal with an identified group of people to escape judicial scrutiny of transactions,[286] it is much harder, or even impossible, to systematically avoid parties under stress. This conclusion arises from the fact that stress, as a form of vulnerability, is a universal and inevitable human condition that transcends group identities and instead necessitates contextual and concrete analysis, rather than a group-based protection.[287] Everyone is vulnerable and can become distressed, because we are all susceptible to an "ever-present possibility of harm, injury, and misfortune."[288] Thus, stress presents a "post-identity paradigm"[289] that alleviates the risk of rejection of particular disadvantaged groups from the contractual sphere. Employers, for example, cannot avoid contracting with their resigning employees, even if courts will be more aware of the stressfulness of a job loss and will heighten their scrutiny over the terms of separation agreements. Since the proposed judicial protection on the basis of stress is carefully calibrated to context, it can create an incentive against exploitation without risking the ability of any particular group to create binding contracts.

2. Stress and the Problem of Fault

Even those who are convinced that the quality of consent—whether "perfect" or impaired—should stand at the center of any discussion involving stress and contracts may still wonder about its relationship to the concept of fault. Can impaired consent itself be sufficient ground for relief or should the impairment result necessarily from faulty acts of the other party?

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285. Bix, *supra* note 256, at 260.

286. I have argued elsewhere that such preference is discriminatory and that contract law, in addition to other laws, should ban it. *See* Hila Keren, *"We Insist! Freedom Now": Does Contract Doctrine Have Anything Constitutional to Say?* 11 MICH. J. RACE & L. 133, 172 (2005) (explaining why and how contract law has an essential role to play in the context of discrimination even when anti-discrimination laws are available and may apply).

287. In making this argument I am drawing on Martha Fineman's compelling vulnerability theory. *See generally* Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J. L. & FEMINISM 1 (2008).

288. *Id.* at 9.

289. *Id.* at 17.

We have already seen that requiring fault as a condition to relief is sometimes explained by the need to discourage wrongful behavior.[290] The main problem with such a fault-based justification is that it conforms to the policies supporting tort law, rather than to the logic of contract. As many legal scholars have posited: Modern contract law is mainly fault-free, while tort law is the field of law saturated with fault.[291] Remarkably, although the fault-based justification is attributed to Judge Posner, it stands in stark conflict with Posner's general writings on the topic of fault in contract law. In a symposium dedicated to the "fault line" that divides tort law from contract law,[292] Judge Posner stressed: "My thesis is that concepts of fault or blame, at least when understood in moral terms rather than translated into economic or other practical terms, *are not useful addenda to the doctrines of contract law*."[293]

It can, of course, be argued that fault should be required in both fields of law. Following such argument to its logical conclusion, it is possible that a given behavior would justify awarding relief under contract law and, at the same time, constitute a tort. And indeed, current tort law addresses stress, even recognizing it as a tort when one is evidently causing the stress of another.[294] However, even if fault *may* appear in both fields of law, it does not mean that it *should* appear in both of them. In this context, note that placing a tort-like goal in contracts has more than theoretical consequences. Because a fault-based system must ensure that the action discouraged is improper enough to justify legal intervention, the bar for fault is raised. While a high bar might be appropriate under a tort regime where fault is often followed by heavy damages, it may be more problematic to adopt contractual high standard of fault when the risk is limited to the invalidation of the contract. The end result of elevating the fault bar is dangerous: Courts may approve and legitimize the vice of taking advantage of another's vulnerability. They may find, as one court bluntly put it, that the "assertion of duress requires more than that a

290. Selmer Co. v. Blakeslee-Midwest Co., 704 F.2d 924, 928 (7th Cir. 1983).

291. *See generally* Roy Kreitner, *Fault at the Contract-Tort Interface*, 107 MICH. L. REV. 1533, 1539–41 (2009) (describing the shift in the modernization of contract law from a fault-based regime to a no-fault, privatized regime).

292. Symposium, *Fault in American Contract Law*, 107 MICH. L. REV. 1341 (2009).

293. Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 MICH. L. REV. 1349, 1349 (2009) (emphasis added). Posner attributed his thesis to Holmes. *Id.* ("I have borrowed this thesis from Holmes, who . . . drew a sharp distinction between tort and contract law, so far as issues of fault or blameworthiness are concerned.").

294. *See* RESTATEMENT (SECOND) OF TORTS § 46 (1965). Remarkably, the comments to the Restatement of Torts suggest that the legal understanding of what is referred to as "emotional distress" is far from being fully developed. *Id.* cmt. c. So much so that a caveat was added stating, "The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress." *Id.* (caveat). Following the above caveat, comment c states, "The law is still in a stage of development, and the ultimate limits of this tort are not yet determined." *Id.* cmt. c.

party *took advantage* of another's negative economic situation."[295] For all those reasons combined, subjecting the contractual relief to a high standard of fault seems questionable.[296]

I would argue further that any consideration of fault should stem from the contractual structure of the dilemma: the need to balance the interests of the party seeking relief and the party who stands to lose a desirable contract if relief is awarded. Conditioning the relief to the distressed party on the presence of some fault of the unstressed party can thus be seen as merely balancing their opposing interests. This balancing does not call for a high level of fault. The goal of assessing the behavior of the party seeking enforcement is not to deter, educate, or punish that party, but rather to satisfy fairness concerns—that is, to make sure that awarding relief would not cause injustice. Thus, even modestly flawed behavior should suffice to award relief to a severely distressed party.

Because a balancing justification is more plausible, the integration challenge is to demonstrate how the study of stress can help in reconceptualizing the kind of fault that might justify relief. First, we are now more able to recognize that stress is almost never caused by one factor or one person; instead, we usually witness clusters of stressors and a resulting distress that has several different causes. Therefore, it is futile to require, as many courts do, that the party seeking enforcement be the main cause of the vulnerability of the party seeking relief. In reality, posing such a high bar of fault simply works to defeat the distressed party, even when some fault of the other party is evident. Such was clearly the situation in *Gascho*. Since Mary Ann was not only under the stress of losing her job, but was also going through a painful and violent divorce, her employer, the party seeking enforcement, could not have been, by definition, the main cause of her stress.

Second, and more significantly, the study of stress teaches us that stress—especially as it so often works in conjunction with depression and insomnia—is highly visible and frequently has many physical manifestations such as crying episodes, irritability, extreme weight changes, dependence on medical treatments, and daily use of medications. All those clear signs of vulnerability strongly suggest that at least some level of fault is almost always present in cases of consenting under stress. Such a basic level of fault originates from the awareness of one party that

295. Storie v. Household Int'l, Inc., No. 03-40268, 2005 WL 3728718, at *5 (D. Mass. Sept. 22, 2005) (emphasis added).

296. This is not to suggest that there are no "pockets of fault" in contract law. For a description of some, see the articles mentioned in Omri Ben-Shahar & Ariel Porat, *Fault in American Contract Law*, 107 MICH. L. REV. 1341, 1342 (2009) (describing contributions by Melvin Eisenberg, Richard Epstein, and George Cohen). However, the authors summarize the entire symposium, stating that "even after highlighting the many faces of fault in contract law, it is all the more clear that the role of fault is limited." *Id.* at 1344.

the other is operating under significant stress, and that awareness is followed by a decision to ignore the palpable signs of distress and move the deal to completion.

The idea can be illustrated by revisiting *Gascho.* The hospital did not cause Mary Ann's divorce, but it strongly encouraged her to sign a release agreement, while understanding the precariousness of her condition and denying her time to recover.[297] In fact, the representatives of the hospital who personally negotiated with Mary Ann admitted knowing everything about her difficult situation—the bruises on her body, her major loss of weight, her severe depression, her insomnia, her medications, and her constant weeping during the closure of the agreement.[298] The hospital's awareness, combined with its determination to proceed with the contractual process, should have together represented a clear willingness to take advantage of Mary Ann's vulnerability.

In most cases, however, the party seeking to enforce the contract is at a higher level of fault and is more involved in exacerbating the stress—even if it cannot be blamed for initially causing it. Parties showing this type of opportunistic behavior are not only aware of the stress of the other but are actively adding to it by pressuring their distressed counterparty. They sometimes do so by creating time pressure, rushing the other party to give consent or suffer the consequences. This is a recurrent story, for example, in the context of prenuptial agreements, when brides-to-be are put in the dilemma of accepting an unfair prenuptial agreement or facing a last-minute cancellation of their wedding. Similar time pressures are imposed in the lending process, where distraught borrowers are told by potential lenders that they have only a limited time to agree to a refinancing agreement before foreclosure will be initiated.[299] Stress studies, as we have seen, demonstrate that time pressure has the ability to aggravate significantly any given set of stressors.[300] Beyond creating time pressure, other examples of fault—in the form of worsening the initial stress and enhancing the vulnerability—include creating an intimidating setting before or during the closure of the deal, overstating the harsh consequences of not signing the contract, and threatening legal actions. In one case, for example, a lender was aware of the borrower's desperate condition, which included the recent death of her

297. Gascho v. Scheurer Hosp., No. 08-10955-BC, 2009 WL 2222872, at *2 (E.D. Mich. July 23, 2009).

298. *Id.*

299. For a vivid description of the impact of time pressure in this lending context, see *In re* Davis, 169 B.R. 285, 290, 297 (Bankr. E.D.N.Y. 1994) ("Everything was done so fast, sign this, sign this. The title man was there. He had a six o'clock appointment it was his son's birthday and he was rushing and I was questioning this thing because I really didn't want to do it. They kept on pushing me and pushing me and saying this and that.").

300. Many stress-sensitive courts intuitively respond to the impact of time pressure. *See, e.g.*, Holler v. Holler, 612 S.E.2d 469, 475–76 (S.C. Ct. App. 2005). ("Husband made it perfectly clear to Wife that she must sign the agreement if she wanted to be married prior to the expiration of her visa.").

husband followed by a diagnosis of "severe depression and diabetes."[301] The lender then added pressure in order to obtain the borrower's consent to a refinancing agreement she could not afford, warning her that she has to act or the lender "will have to take other action."[302]

To a large extent, fault is tied to stress because of its fundamentally seductive quality. Being so evident and extreme, stress seems to entice exploitation because it presents an easy opportunity to make extra profit—profit not possible under normal conditions. Sadly, for too many players in the market, this temptation is hard to resist. Problematically, courts that fail to define the act of taking advantage as sufficient fault not only allow such behavior but also reward it.

To conclude, the kind of fault that should be required as a condition for relief should be changed to include all the cases in which the party seeking enforcement knew or should have known about the stress. Due to the characteristic visibility of stress and its outcomes, a state of true innocence is, at best, rare. Indeed, in the many cases discussed in this Article, no party argued that they failed to notice the stress of the party seeking relief.[303] Therefore, each time the party seeking relief is able to prove its distress at the time of consent, relief should not be denied based on no-fault arguments unless the party seeking enforcement can show innocence—that is, that there were no signs of severe stress and that it did not and should have not known about the other's vulnerability.[304] No party to a contract has a valid expectation for social support—by way of judicial enforcement—when it was involved in exploiting distress, such as when a party obtains consent from someone who is shaking and crying. The proposed broadening of the concept of fault from causing stress to being aware of it can be supported by the need to protect individuals, and the market as a whole, from exploitative behavior.[305] Finally, what I suggest

301. Beneficial Mortg. Co. of Ohio v. Leach, No. 01AP-737, 2002 WL 926759, at *6 (Ohio Ct. App. May 9, 2002).

302. *Id.* Although the court did not find such exploitative behavior as satisfying the requirements of the duress doctrine, it did find the facts justified a hearing with regard to possible unconscionability. There is a conceptual damage, however, in thinking and declaring that there is not enough wrong in taking advantage of others. Also, in many other cases the analysis of "not-enough-fault" leads to total rejection of the stress argument. *See, e.g.*, Storie v. Household Int'l, Inc., No. 03-40268, 2005 WL 3728718, at*9 (D. Mass. Sept. 22, 2005).

303. However, the possibility exists, as one can imagine, that some individuals might conceal their stress during the negotiation to avoid exploitation of their vulnerability.

304. Compare this to the defense of unilateral mistake, RESTATEMENT (SECOND) OF CONTRACTS § 153 cmt. a (1981) ("[R]elief has been granted where the other party actually knew or had reason to know of the mistake at the time the contract was made or where his fault caused the mistake." (citation omitted)).

305. *See, e.g.*, Rich & Whillock, Inc. v. Ashton Dev., Inc., 204 Cal. Rptr. 86, 90 (Cal. App. 1984) ("Those rules are not limited to precepts of rationality and self-interest. They include equitable notions of fairness and propriety which preclude the *wrongful exploitation* of business exigencies to obtain disproportionate exchanges of value. Such exchanges make a mockery of freedom of contract and undermine the proper functioning of our economic system." (emphasis added)); Spencer Nathan

can also be explained in terms of risk allocation: Taking advantage of perceptible stress in order to win a contractual windfall can be seen as taking a calculated risk that the distressed party may later on, typically after some recovery, seek relief. It is, therefore, within the judicial role, and in fact a judicial duty, to do justice in those situations by appropriately balancing the parties' interests.

3. Stress and the Objective/Subjective Dichotomy

As we have seen, the fault requirement is not the only obstacle to those who seek a remedy for consenting under stress. They are often judged for surrendering to "subjective" feelings rather than utilizing "objectively" available alternatives. A prime example appears in *Satter*, in which the court stated:

> When Satter states that she suffered anxiety, depression, and an inability to sleep or be alone, she is speaking about things she *subjectively felt and experienced*. . . . [T]he Court's duty is to decide whether a reasonable person in Satter's position . . . would have felt forced to resign. Such an *objective standard* does not take into account the things Satter was *subjectively feeling* or experiencing emotionally . . . .[306]

Despite those clear words, the objective/subjective dichotomy is highly inappropriate if one understands how stress operates. Integrating that knowledge into legal analysis produces several important conclusions. First, stress is not dominantly subjective but rather a common and patterned factual phenomenon, as suggested by the host of inventories of common stressors and recognized outcomes of stress. Even if stressors impact individuals differently, it is not mainly due to their unique emotional fabric, but is usually a result of other objective factors, such as other existing stressors, their social status, and/or the resources available to them. Furthermore, since stress is visible, measurable, and provable, it can be described as objective rather than subjective. Many distressed parties show evident physical signs of severe stress—such as crying and shaking while giving their consent[307]—and/or present clear professional

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Thal, *The Inequality of Bargaining Power Doctrine: The Problem of Defining Contractual Unfairness*, 8 OXFORD J. LEGAL STUD. 17, 22 (1988) ("[F]reedom of contract doctrine should not be accepted as a validating principle for contracts which arise as a result of exploitation. . . . [T]he most significant problem . . . is . . . formulating a coherent definition of exploitation. Such a definition is essential in order to maintain the limited nature of the claim.").

306. Satter v. Wash. State Dep't of Ecology, 2010 U.S. Dist. LEXIS 80520, at *6 (W.D. Wash. Aug. 10, 2010). For a case using similar juxtaposition, see *Middleton v. Dep't of Def.*, 185 F.3d 1374, 1379 (Fed. Cir. 1999) ("This test is an objective, rather than subjective one; an employee's *subjective feelings* are irrelevant." (emphasis added)); Christie v. United States, 518 F.2d 584, 587 (Ct. Cl. 1975) ("Duress is not measured by the employee's *subjective evaluation* of a situation. Rather, the test is an objective one." (emphasis added)).

307. McDevitt v. Guenther, 522 F. Supp. 2d 1272, 1278 (D. Haw. 2007) (a bride-to-be signing a harsh prenuptial agreement, in front of a notary, while crying, shaking and vomiting).

evidence of their distressed condition.[308] Their stress exists objectively and should be evaluated accordingly.

Second, similar to the way in which stress is not merely subjective, the reasonable alternative test is not purely an objective test. The alternatives imagined in retrospect by judges are often not available to a distressed party who is under pressure to give consent or suffer severe consequences. It is doubtful, for example, whether a bride-to-be, just a few days before her wedding, can see (or should see) the alternative of cancelling her wedding at the last minute as a viable alternative. Although such an alternative may seem reasonable to a judge who looks at the situation years after the signing of the prenuptial agreement, such a view is not more objective than the bride's perspective at the time of signing.[309] More generally, judges often point to possible forms of action that are heavily influenced by their own (subjective) combinations of capabilities, resources, resilience, and calm. Consequently, they frequently end up recommending litigation as a reasonable alternative, without taking into account the demanding and intimidating nature of the process—especially for lay people overwhelmed by stress. Additionally, and more critically, as the alternatives study has shown,[310] the scanning of alternatives by persons under stress is different than the scanning of alternatives by unstressed people—a fact that needs to be taken into account.

If stress is not a subjective feeling and the alternatives are not so objective, it is essential to eliminate such rhetoric as—due to lingering legal aversion to subjectivity and resistance to arguments based on emotions[311]—it leaves little chance for appropriate treatment of the problem. The "reasonable alternative" test should therefore be refined to better reflect the science of stress, which shows that distressed parties have limited reasonable alternatives.

B. Framework for Taking Stress into Account

As I have argued thus far, taking stress into account is not only highly important, it is also attainable. Critically and perhaps surprisingly, it would require little change of doctrine. Once the veil of "subjective feeling" is removed and the focus is shifted from the fault of the party

308. Gascho v. Scheurer Hosp., 400 F. App'x 978, 980 (6th Cir. 2010) (introducing a detailed psychiatric report confirming major depression from the day that followed the signing of the contract).

309. *See, e.g.*, *In re* Marriage of Spiegel, 553 N.W.2d 309, 318 (Iowa 1996) ("Here, Sara had a reasonable alternative—she could have canceled the wedding. Although she may have suffered embarrassment in doing so, we do not think social embarrassment from the cancellation of wedding plans, even on the eve of the wedding, renders that choice unreasonable.").

310. Keinan, *supra* note 235, at 643. For a discussion of Keinan's work in the context of the recent subprime crisis, see Lauren E. Willis, *Decisionmaking and the Limits of Disclosure: The Problem of Predatory Lending: Price*, 65 Md. L. Rev. 707, 769–71 (2006).

311. *See, e.g.*, Abrams & Keren, *supra* note 88, at 1998.

seeking enforcement to the quality of consent of the party seeking relief, the challenge is almost fully met. Courts and practitioners can use the knowledge accumulated in years of research to evaluate stress arguments and in appropriate cases—when stress has led to an unfair contract—to prevent the exploitation of distressed parties.[312] One stress-sensitive starting point may come from Europe, where the principles of contract law include an explicit ban on exploiting or profiting from the vulnerability of others.[313] Next, I suggest that a stress-sensitive approach will build on the intuitive reasoning of stress-sensitive case law and augment that reasoning with considerations informed by the study of stress. Within this suggested stress-sensitive framework, four elements deserve special attention: the existence of scientifically acknowledged common stressors, the presence of factors creating special vulnerability, the manifestation of recognized symptoms, and the question of alternatives to contractual consent for a distressed person.

1. Common Stressors

A stress argument relies on a stressor that allegedly had caused the stress. The inventories described in Part II allow an evaluation of the alleged stressor: The more recognizable and severe the stressor is considered by stress specialists, the more credibility should be given to the stress argument. This Article highlights three contractual contexts in which the agreements are made in an environment that is loaded with common and acknowledged stressors. First, in the employment setting, employees consenting to resign and release their employers from liability are often doing so under special stressful circumstances.[314] However, even without additional misfortunes, the instability at the workplace and the anticipation of a job loss are recognized significant stressors. Second, contracts between borrowers and lenders are frequently made under

312. To prevent such exploitation, any of the existing doctrines of unconscionability, undue influence and/or duress may be used, and/or an expanded duty to negotiate in good faith can be adopted. Comparing the doctrines and choosing between them goes beyond the purpose and scope of this Article, given its focus on the problem of stress. However, others have discussed the similarities and differences between those doctrines. *See, e.g.*, John Phillips, *Protecting Those in a Disadvantageous Negotiating Position: Unconscionable Bargains as a Unifying Doctrine*, 45 WAKE FOREST L. REV. 837 (2010).

313. Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, 107 MICH. L. REV. 1413, 1418 (2009) (citing the Principles of European Contract Law, which provide: "A party may avoid a contract if, at the time of the conclusion of the contract: (a) it was . . . in economic distress or had urgent needs, was improvident, ignorant, inexperienced or lacking in bargaining skill, and (b) the other party knew or ought to have known of this and, given the circumstances and purpose of the contract, *took advantage* of the first party's situation in a way which was *grossly unfair* or took an excessive benefit." (emphasis added)).

314. Recall, for example, the sexual harassment suffered by Ms. Meyers, Meyers v. Trugreen, Inc., No. 03 C 7570, 2004 U.S. Dist. LEXIS 9200 (N.D. Ill. May 21, 2004), and the hostile environment that had developed in the hospital that employed Ms. Gascho, Gascho v. Scheurer Hosp., 400 F. App'x 978, 979–80 (6th Cir. 2010).

conditions related to the accepted stressor of financial strains. And third, in the intimate sphere, settlements between life-partners—either before the marriage or as part of a divorce process—are also made in connection with life-changing events that rank high on inventories of stressors. Other stress arguments can be concretely judged by a relatively simple review of the stress literature, which can assist in distinguishing situations that are acknowledged for their likelihood to produce stress from those which are less familiar or plausible.

2. Special Vulnerability Issues

In constructing or evaluating a stress argument, special attention should be given not only to commonalities between people, but also to factors that make them differ in their response to stressful events. Thus, individual and social factors that tend to enhance or decrease the level of stress should be taken into account. Starting from the individual level, courts should evaluate any argument contextually to assess the significance of the leading stressor for the person before them. Additionally, the primary stressor in each case should not be reviewed in isolation; rather, clustering of stressors and the tendency of stressors to proliferate should be considered, and other existing stressors should be defined as well. *Holler*,[315] for example, demonstrates the way that a fear of a last-minute wedding cancellation combines with the challenges of pregnancy, unemployment, and an immigrant visa that is about to expire. Still at the individual level, the material and mental resources available for coping with "universal," or objective, stressors should play an essential role in the evaluation of the magnitude of the stress. As we have seen, abundant resources make it easier to cope while exhausted reserves may escalate the initial problem.

Beyond the individual level, appreciation of what theorists have called "the social distribution of stress" necessitates sensitivity to the role of race, gender, and social status. For example, the fact that women are influenced more than men by interpersonal stressors should add credibility to a stress argument made by women who have given consent in the course of a difficult divorce process. To take another example, research has demonstrated that every step down the ladder of socioeconomic status produces more stress, as less control allows less room for coping.[316] Integrating this piece of information into the analysis can justify, for example, the intuitive result of the stress-sensitive *Meyers* decision.[317] Meyers' stress argument gains power if we bear in mind her low status as a young sales associate who was sexually harassed by a series of senior

315. Holler v. Holler, 612 S.E.2d 469, 475–76 (S.C. Ct. App. 2005).

316. *See supra* notes 195–196 and accompanying text.

317. *Meyers*, 2004 U.S. Dist. LEXIS 9200 at *17.

male managers. Moreover, in addition to special factors affecting individuals and social differences, some concrete circumstances should be considered relevant. For example, time pressure has been consistently shown to aggravate stress, a fact that has been intuitively recognized by some stress-sensitive courts.[318]

3. Recognizable Symptoms

As we have seen, stressors trigger a secretion of special hormones in the brain, and those eventually create recognizable symptoms of stress such as insomnia, depression, and change in body weight. These symptoms can assist in evaluating the credibility of a given stress argument and can alleviate the fear of manipulation that comes from conceptualizing stress as merely a feeling. Importantly, recognizing the chemical cortisol connection between stress, insomnia, and depression makes it crucial that legal actors, from lawyers to judges, take greater cognizance of medical evidence. A psychiatric report that proves major depression and is not disputed by the other party, for example, cannot remain irrelevant to courts that care about quality of consent; the same goes for evidence regarding use of prescribed medications to relieve stress symptoms.[319]

4. Reasonable Alternatives

Any consideration of reasonable alternatives must reflect the way that stress limits the ability to perceive alternatives and impairs the competence to choose reasonably among those perceived as available. A stress-sensitive analysis would take these insights into account and re-focus the question of alternatives. If the stress argument is plausible, under the first three elements, the question should be whether it was reasonable for a person under such stress to consent to an undesirable contract. The burden of showing that another alternative was visible and viable for the person under stress should accordingly shift to the party seeking to enforce the contract.

CONCLUSION

These four elements suggest a framework for an informed evaluation of stress arguments that brings non-legal knowledge to an important and familiar legal question—the question of consenting under stress. Unfortunately, with the current deep recession and its

318. *Id.* at *15 (stating that the situation became more acute because Meyers had only three days to deliberate).

319. For an example of courts' disregard of medical evidence, see *Gascho*, 400 F. App'x at 980; Satter v. Wash. State Dep't of Ecology, 2010 U.S. Dist. LEXIS 80520 (W.D. Wash. Aug. 10, 2010); s*ee also* Coleman v. Coleman, 681 P.2d 1269, 1270 (Utah 1984) (rejecting a stress argument despite a physician's testimony that described the distressed party as "very depressed," incapable of making important decisions, and using prescribed tranquilizers and antidepressants).

consequences, the question is especially relevant and requires immediate attention. So far, most legal actors have fallen short in fully coping with this issue. However, as I have argued here, law cannot afford to remain coldly doctrinal and isolated from other bodies of knowledge. An isolated, insensitive legal response to stress could become another major stressor in people's lives, exacerbating rather than mitigating problems of exploitation.

I am not the first to suggest that exploiting others' vulnerability is or should be unacceptable under contract law.[320] However, this Article is now contributing a studied explanation of why it is not only justified but also important, and quite urgent, to do so. To the legal arena it offers the first account of how stress can impair consent, even where that stress is not caused by the other party. It also provides a counterargument to Posner's fault approach, which permits the exploitation of vulnerability as an acceptable contractual practice. With the study of stress gradually illuminating the scope of the problem and its dire consequences to individuals, communities, and society at large, law cannot afford to remain behind. In the face of stressful life circumstances, the law can offer relief by outlawing the exploitation of stress and vulnerability. It is incumbent on legal actors to take this path.

In the field of contract law, the long interdisciplinary journey charted here leads to a relatively simple, practical conclusion. A more responsive contract law must attend more carefully to the quality of consent as a condition for contractual validity. Deploying the four basic elements outlined above, existing fairness-oriented doctrines—such as duress or unconscionability—can be used to protect those whose consent was impaired by stress. In fact, some stress-sensitive courts are already showing protective inclinations, and this Article offers a research-based justification for their decisions.

Theoretically, however, the insight reflected in this Article extends far beyond the contractual arena. Consent given under stress presents a legal problem in a host of legal fields, both substantial and procedural. People may consent under stress to have sex (criminal law), to have children (family law), to go through medical procedures (health law), to use arbitration or mediation (civil procedure), to sign a plea bargain (criminal procedure), and so forth. In all those matters, and others, the law can benefit by understanding the operation and effects of stress and by accounting for it in the analysis of consent. This Article offers a path toward that goal.

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320. *See, e.g.*, John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 288–90 (1947) (famously arguing that the duress doctrine was based on the principle of prevention of excessive gain resulting from exploitation of impaired bargaining power); *see also* ALAN WERTHEIMER, EXPLOITATION 37–76 (1996) (arguing that cases in which relief was given under the doctrine of unconscionability often can be explained by the existence of exploitation).

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